90-745

No. 90-____

Supreme Court, U.S.
FILED
NOV 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LINDA WHEELER TARPEH-DOE, individually and as mother and next friend of NYENPAN TARPEH-DOE, and MARILYN L. WHEELER,

Petitioners,

v.

THE UNITED STATES OF AMERICA, and THE SECRETARY OF STATE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

JOHN JUDE O'DONNELL *
RANDELL HUNT NORTON
JOSEPH MICHAEL HANNON, JR.
THOMPSON, MCGRAIL, O'DONNELL & HARDING
730 15th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-2244
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

In 1946 Congress enacted the Federal Tort Claims Act permitting suit against the United States. That Act retained an exemption for suits against the government for tortious conduct occurring in a foreign country.

In 1956, however, Congress passed the Act of August 1, 1956, which authorized the Secretary of State to pay tort claims against the Department of State arising in a foreign country. The Act of August 1, 1956, adopted the administrative mechanism of the Federal Tort Claims Act for the Secretary's consideration of foreign-origin tort claims with the exception of the right to a trial *de novo*.

Petitioners respectfully suggest that the following questions are presented for consideration in this petition:

I. Whether the Department of State's arbitrary denial—determined in secret without explanation, findings of fact, conclusions of law, disclosure of evidence or any minimal procedural protections—of a Congressionally-authorized foreign-origin tort claim violates the Due Process Clause of the Fifth Amendment where the claimant has established a *prima facie* case of eligibility for such recovery.

II. Whether the Department of State's entirely secret and *ex parte* consideration and denial of a Congressionally-authorized foreign-origin tort claim violates the intent of Congress to compensate meritorious claims brought against the United States.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90- ——

LINDA WHEELER TARPEH-DOE, individually and as mother and next friend of NYENPAN TARPEH-DOE, and MARILYN L. WHEELER,

Petitioners,

v.

THE UNITED STATES OF AMERICA, and THE SECRETARY OF STATE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit and the dissent of The Honorable Chief Judge Patricia H. Wald are reported at 904 F.2d 719 and are reprinted in the Appendix hereto ("App.") at 1a.

The opinion of the District Court of The Honorable Louis F. Oberdorfer is reported at 712 F. Supp. 1 (D.D.C. 1989), and is reprinted in the Appendix hereto at 17a.

The unreported administrative decision of the Department of State is reprinted in the Appendix hereto at 31a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1990. App. at 1a. That court's orders denying a timely petition for rehearing and petition for rehearing *en banc* were entered on August 13, 1990. App. at 46a and 47a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

No person shall . . . be deprived of life, liberty, or property, without due process of law. U.S. Const. amend. V.

The Act of August 1, 1956 [22 U.S.C. § 2669(f)], pertinent portions of the Federal Tort Claims Act [28 U.S.C. § 2671 *et seq.*], and the pertinent portions of the Department of State Regulations [22 C.F.R. Part 31 (1989)] are reprinted in the Appendix, *infra.*

STATEMENT OF THE CASE

This Court has never addressed the question of whether a claimant for Congressionally-authorized benefits has a property interest entitling him to certain procedural protections before that claim is denied. *Lyng v. Payne*, 476 U.S. 926, 942 (1986) (O'Connor, J.); *Gregory v. Town of Pittsfield*, 470 U.S. 1018 (1985) (O'Connor, J., joined by Marshall, J., and Brennan, J.; dissenting from denial of *certiorari*); *Peer v. Griffith*, 445 U.S. 970 (1980) (Rehnquist, J.; dissenting from denial of *certiorari*).

In this case, a $6 million dollar administrative tort claim filed against the Department of State by an employee seeking compensation for the grossly negligent medical treatment of her infant son at the hands of a Department of State physician in Monrovia, Liberia, was denied by the Department without any statement of law or reasons. Despite repeated requests by petitioners, at no time

did the Department identify the witnesses on whom it relied, the evidence on which it relied, or the records and exhibits on which it relied. No administrative record was made or preserved. No hearing or administrative proceeding was ever held.

The claim was denied despite the fact that petitioners had presented a detailed *prima facie* case of liability and damages. Petitioners had no opportunity to rebut, address, or even know of the evidence—if any—against them. There is no evidence that the Department properly considered all factors relevant to the claim or that it weighed evidence according to any acceptable standard. Indeed, petitioners do not even know what law was applied in the Department's investigation. No judicial review was permitted of the Department's action, as it pertained to negligence occurring outside the United States. *See* 28 U.S.C. § 2680(k) (precluding a trial *de novo* in federal district court for tort actions against the United States arising in a foreign country). App. at 35a. Hence, there is absolutely no evidence from which petitioners—or anyone else—can conclude that this administrative tort claim was fairly considered.[1]

A. The Underlying Factual Allegations[2]

On May 18, 1982, Nyenpan Tarpeh-Doe II, minor petitioner herein, was born to Linda Wheeler Tarpeh-Doe in Monrovia, Liberia, where Mrs. Tarpeh-Doe was assigned to the United States Embassy as an employee of the

---

[1] Proceedings in the District Court have continued on petitioners' "headquarters claim" alleging negligent retention and supervision of the physician by the Department. Such "headquarters claims" are cognizable in the district court in a trial *de novo*. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Department of State has also refused to disclose in that case, despite petitioners' discovery demands, the bulk of the information purportedly collected in the process of considering the administrative claim.

[2] The factual statement herein is taken from the petitioners' Second Amended Complaint in the District Court.

Agency for International Development (AID). AID was a participant by formal agreement in the Medical and Health Program of the Department of State, and the benefits of that program were guaranteed to Mrs. Tarpeh-Doe and her new-born son:

> The general medical policy of the Department of State is to assist all American employees and their dependents in obtaining the best possible medical care . . . . This policy extends to the most remote parts of the world, so that no employee need hesitate to accept an assignment to a post where health conditions are hazardous, medical service poor, or transportation facilities limited. Principal and administrative officers and their designees and principal representatives of participating agencies are cautioned to be alert to any medical and health problems of employees and their dependents and to take appropriate action promptly.

3 Foreign Affairs Manual [FAM] § 681.2.

On Saturday, June 5, 1982, the baby became very ill and was taken to the Embassy's Health Care Unit where he was examined by the Embassy medical officer, physician Theodore E. Lefton, M.D. Without performing any of the customary tests, Dr. Lefton administered antibiotics to the child which had the effect of masking later tests that were performed for the purpose of diagnosis. As a long term consequence, the baby did not receive proper treatment and suffered his devastating injuries. Following this initial treatment, the baby had a second seizure during which it became rigid. Dr. Lefton told the parents he did not know what was wrong with the baby and that the child would be medically evacuated to the United States that evening. Such evacuation is afforded employee dependents under the Medical and Health Program of the Department of State. *See* 3 FAM § 685.4c.

Since the evacuation would not take place until that night, Dr. Lefton told the parents that he would have David E. Van Reken, M.D., an American missionary

physician in charge of the pediatric ward at John F. Kennedy Hospital in Monrovia, examine the baby. On Dr. Van Reken's orders the baby was taken to John F. Kennedy Hospital over the continuing objections of the parents who demanded evacuation of the child to the United States and who were aware of the deplorable conditions at Kennedy.[3] After examining the baby once again, Dr. Van Reken said to the parents, "I can make the baby well." Thereafter, Dr. Lefton said he would no longer approve the evacuation of the child to the United States. As a result of this failure immediately to evacuate the child, the incompetent and negligent treatment was prolonged.

During the night at John F. Kennedy, the child received very little professional help from the staff. The sleeping facility was full of insects. The next morning, at the parents' insistence, the baby was transferred by Dr. Van Reken to ELWA Hospital, a local missionary hospital. The baby remained critically ill. Physicians at ELWA were unable to insert I.V. needles properly. Every day one or both parents requested that the baby be transferred to a hospital in the United States, even offering to pay their own way. Their requests were denied, even though petitioner Marilyn Wheeler, mother of Linda Tarpeh-Doe and presently the legal guardian of the child, had made arrangements for neonatologists at the University of Colorado Hospital to receive and treat the child.

Finally, after no basic improvement in the condition of the baby, he was evacuated by the Department of State to the University of Colorado Hospital, Denver, Colorado, on July 17, 1982, where the baby's illness was properly diagnosed for the first time and vigorous treatment initiated. Notwithstanding, the damage had been done.

The child is presently living at the Wheat Ridge Regional Center in Colorado where he will remain institu-

---

[3] In its answer to the complaint in the district court, the Department of State admits that "conditions at the John F. Kennedy Medical Cener would not meet United States standards."

tionalized for the rest of his life. The child is blind, deaf and severely brain damaged. The possibility of improvement is basically nonexistent.[4]

B. Petitioners' Administrative Claim Under the Federal Tort Claims Act

As a consequence of the negligent acts of the Department of State and its employees, occurring in Liberia as well as in the United States, Mrs. Tarpeh-Doe and her mother instituted an administrative tort claim with the Agency for International Development on January 31, 1984, under the Federal Tort Claims Act and the Act of August 1, 1956, which authorizes the Department to pay compensation for torts of Department of State employees committed outside the United States. 28 U.S.C. § 2672; 22 U.S.C. § 2669(f). App. at 33a. Pursuant to the regulations promulgated by the Department for consideration of such claims, petitioners' claim consisted of a factual statement, a list of nineteen witnesses, eighteen exhibits, and reports from medical experts regarding the breach of accepted standards of care by the Department and the causal relationship to the child's injuries. Such an administrative claim is a prerequisite to a suit against the Department for negligent acts committed in the United States, 28 U.S.C. § 2675(a), and the only remedy available for negligent acts arising outside the United States. *See* 28 U.S.C. § 2680(k) and 22 U.S.C. § 2669(f).

After almost four years of secrecy, the claim was summarily denied on October 9, 1987, in a letter to counsel for the Tarpeh-Does. App. at 31a.[5] During this entire

---

[4] All of this evidence was presented to the Department of State in the ensuing administrative claim, which is the subject of this petition, supported by appropriate expert and other evidence.

[5] The claim was denied by an Assistant Legal Advisor. At the time, he was not authorized by the Secretary to act on this claim. Only the Legal Advisor and Deputy Legal Advisor were authorized to consider such administrative claims. *See* 22 C.F.R. § 31.2 (1987).

Only after the denial of the claim was the Assistant Legal Advisor delegated such authority. *See* 52 Fed. Reg. 43193 and

period the Department steadfastly refused to provide any information about the evidence being considered in ruling on the claim, despite repeated demands for such information by petitioners' counsel. In contrast petitioners continually provided documentary and expert evidence supporting their claim, updating the medical record and affording the Department reports of their own experts. The Department, on the other hand, provided no information to Mrs. Tarpeh-Doe and her mother other than inconsistent and untrue excuses for delay. Initially, Mrs. Tarpeh-Doe and her mother were told that the investigation "might take another couple of months." Then in October of 1984, petitioners were told that the Department's Medical Division had completed its report which was being circulated for comment, apparently within the Department.

Two months later, however, Mrs. Tarpeh-Doe and her mother were informed that the Medical Division had *not* completed its investigation. Six months later, nearing the third anniversary of the child's injury, petitioners were told that the Department was gathering additional medical records in Liberia. For the next two years, petitioners through counsel repeatedly requested access to evidence, identity of witnesses, an opportunity to rebut evidence if necessary, and other concomitants of minimal due process. These requests were denied by the Department on the grounds that the burden of proof "must be borne by claimant." [6]

43263 (November 10, 1987); *see also* 22 C.F.R. § 31.2 (1989). Even then, the Assistant Legal Advisor would only have had authority to *deny* the claim, since the claim exceeded his authority level of $2,500.

[6] Mrs. Tarpeh-Doe and her mother could have brought suit in federal district court on their "headquarters claim" after six months

C. Proceedings in the District Court

1. *The Complaint and its Consideration by the Court*

Upon receipt of the Department's written denial, Mrs. Tarpeh-Doe and her mother filed a two-pronged complaint in the district court under the Federal Tort Claims Act and the Constitution, seeking a trial *de novo* on their "headquarters claim" and seeking relief from the Department's arbitrary and capricious denial of the foreign-origin tort claim. The Constitutional claim—which is at issue in this petition—alleged that the Department's review of the foreign-origin claim had violated the petitioners' administrative, substantive and procedural due process rights. Seeking only "minimal due process" the Constitutional claim requested, *inter alia*, a remand to the Secretary of State for a complete, fair and proper reevaluation of the claim in accordance with due process.

Upon denial by the district court of the Department's first motion for summary judgment on the Constitutional claim, in which the district court strongly indicated that it would require the Department's evidence to be disclosed to petitioners, the Department averred for the first time that the investigative materials collected in its review of the administrative claim could not be disclosed since "the review [of the administrative claim] was accomplished in anticipation of litigation." The Department took the position that since it could expect a trial *de novo* on the "headquarters claim," it was entitled to act in anticipation of such litigation during its administrative review.

---

of inaction by the Department. *See* 28 U.S.C. § 2675(a). Such a suit, however, should have been entirely unnecessary since the issue of primary negligence in Liberia could have been resolved properly through the administrative claims process, pursuant to the regulations promulgated for that purpose by the Department. *See* 22 C.F.R. Part 31. App. at 36a.

This disclosure prompted the district court to observe that a review of the administrative claim, conducted in anticipation of litigation, was inconsistent with petitioners' right to a fair opportunity to have the claim adjudicated by a neutral decisionmaker, since the out-of-country claim is not reviewable in a trial *de novo*. The district court observed,

> [Petitioners] are entitled to an adjudication as distinguished from the action of claims agents anticipating a *de novo* trial. It requires no authority beyond the plain language of the due process clause to know that in an adjudication the parties are entitled to know and have an opportunity to address the evidence to be used by the adjudicator in making his decision.

App. at 30a. Upon cross-motions for summary judgment the district court subsequently concluded that the Department's secret and one-sided administrative review violated petitioners' due process rights.

2. *The District Court's Ruling*

In so ruling, Judge Oberdorfer agreed with the only other court to rule on this issue,[7] that the terms of the Act of August 1, 1956 [22 U.S.C. § 2669(f)] and the implementing regulations of the Secretary of State [22 C.F.R. Part 31] afforded Mrs. Tarpeh-Doe and her mother a right to bring claims of foreign origin, which right "cannot be dealt with arbitrarily." App. at 22a. Judge Oberdorfer concluded that whatever reason Congress may have had for denying citizens injured abroad access to a trial *de novo*, "it does not follow that Congress intended, or could constitutionally intend, that the Executive Branch administer these citizens' claims without recognition of the 'relatively immutable principle' that requires disclosure of evidence and 'an opportunity

---

[7] *Gerritson v. Vance*, 488 F.Supp. 267 (D. Mass. 1980).

to show that it is untrue,' " citing *Greene v. McElroy*, 360 U.S. 474 (1959). App. at 22a.

Judge Oberdorfer concluded that Mrs. Tarpeh-Doe and her mother must be afforded "at least some minimal due process procedures." *Id.* Their right to have the administrative claim fairly considered outweighed any governmental interest to the contrary. In fact, the district court concluded that the Department of State had not demonstrated "*any* rational governmental interest in a general rule that precludes citizens injured abroad by the United States from knowing the evidence used against them and that cuts off the constitutional right that plaintiffs here assert." App. at 23a. Therefore, the court ordered the Department to disclose its evidence, to afford petitioners an opportunity to comment on and counter such evidence, and to make and provide to petitioners findings of fact. App. at 25a.

D. The Decision of the United States Court of Appeals for the District of Columbia Circuit

1. *The Majority Opinion*

The majority of the circuit court, oddly following the test enunciated by this Court for the evaluation of conferred due process rights in the prison setting, concluded that the Act of August 1, 1956, and the Department's implementing regulations do not confer a property interest upon petitioners which is entitled to procedural protections under the Fifth Amendment. The circuit court—deferring to the Department's purported but unsubstantiated construction of its own regulations—concluded that the Secretary of State had absolute discretion to grant or deny foreign origin tort claims, *regardless of their merit.*

Observing that the "Regulations are prone to misconstruction" and that the " 'procedure' established by the Regulations is suitable to Lilliput," the majority

"share[d] the dissent's discomfort with the result in this case." App. at 10a. However, the majority felt bound by this Court's "precedent" in the prison cases and accepted the Department's own unsubstantiated interpretation of its obligations under the regulations.

2. *The Dissent*

The dissent concluded from a review of the overall scheme of the Act of August 1, 1956, the Federal Tort Claims Act, the Department's regulations, and the relevant legislative history that, "When Congress provided agencies with the ability to settle FTCA claims administratively, it assumed a merit-based, tort compensation system—a system that would make the United States liable 'in the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. § 2674." App. at 34a:

> The Regulations most assuredly do not say that a claimant may be led down the yellow brick road of "thorough investigation," only to be faced at the end with a wizard-like administrator flipping coins behind a screen.

App. at 16a.

REASONS FOR GRANTING THE WRIT

This case requires a determination of the procedural rights of an applicant for important government benefits, where that applicant has no present enjoyment of such benefits. Where the nature of those procedural rights is left to unscrutinized agency interpretation, it affords the executive agency the discretion to act arbitrarily and in disregard of the plain intent of Congress. *See Lyng v. Payne*, *supra*, 476 U.S. at 952 (Stevens, J.; dissenting). While this Court "has never addressed the issue whether applicants for general assistance have a protected property interest . . . the weight of authority among lower courts is contrary to the conclusion [that they do not]." *Gregory v. Town of Pittsfield*, *supra*, 470 U.S. at 1021, (O'Connor, J., with Brennan, J., and Marshall, J.; dissenting from denial of *certiorari*).

The following lower court decisions recognize that a mere applicant for important benefits enjoys a property right deserving of the protections of the due process clause. *McDarby v. Dinkins*, 907 F.2d 1334 (2d Cir. 1990) (pension benefits); *Allison v. Heckler*, 711 F.2d 145 (10th Cir. 1983) (social security disability benefits); *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982) (HUD Section 8 housing); *Davis v. Ball Memorial Hospital Association*, 640 F.2d 30 (7th Cir. 1980) (hospital services under the Hill-Burton Act); *Kelly v. Railroad Retirement Board*, 625 F.2d 486 (3d Cir. 1980) (disabled child's annuity); *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973) (driver's license).

Other courts—some of which acknowledge the absence of a definitive ruling on this issue from this Court—avoid grappling with the property issue by assuming the existence of a property interest and finding that the minimal procedures afforded the applicant complied with due process. *See, e.g., West v. Bowen*, 879 F.2d 1122 (3d Cir. 1989) (food stamp benefits); *Jordan v. Benefits Review Board*, 876 F.2d 1455 (11th Cir.

1989) (black lung benefits); *Adams v. Harris*, 643 F.2d 995 (4th Cir. 1981) (social security benefits); *Korte v. Office of Personnel Management*, 797 F.2d 967 (Fed. Cir. 1986) (air traffic controllers).

In addressing the fact that this Court has yet to rule on whether mere applicants for benefits enjoy a right protected under the due process clause, three constitutional scholars have observed:

> [I]t should be noted that the Supreme Court has not yet been confronted with a state which refuses to give any explanation or procedure to a person who is denied an initial allocation of a very important government benefit.

R. Rotunda, J. Nowak and J. Young, *Treatise on Constitutional Law: Substance and Procedure*, § 17.5 at 236 (Vol. 2, 1986).

Petitioners respectfully submit that this is such a case. The Tarpeh-Doe baby was permanently brain-damaged by the negligence of a Department of State physician. Petitioners' administrative claim has been denied without any explanation or procedural protections whatsoever. The circuit court upheld this treatment by deferring to the Department's own views of what process was due petitioners. Yet, the only evidence of record in the district court consists of petitioners' unrebutted *prima facie* case of negligence. This Court's consideration of this issue is needed to prevent arbitrary agency action in derogation of rights of citizens and the intent of Congress, and to correct this unjustified interpretation of the Federal Tort Claims Act.

I. THE CIRCUIT COURT'S DECISION ENDORSES AN AGENCY'S ARBITRARY DENIAL OF A CLAIM FOR CONGRESSIONALLY-AUTHORIZED BENEFITS, EVEN WHERE THE CLAIMANT HAS ESTABLISHED A *PRIMA FACIE* CASE OF ELIGIBILITY FOR SUCH BENEFITS, IN CONFLICT WITH THE MAJORITY OF CIRCUITS

The procedural protections of the Due Process Clause of the Fifth Amendment are afforded to citizens in order to safeguard their interests in property. Property interests "are not created by the Constitution. Rather, they are created . . . by existing rules or understandings that stem from an independent source such as . . . rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Based on this notion of property, this Court has held—even in the prison context where rights of citizens are sharply circumscribed—that statutes or regulations prescribing the substantive predicates for state action may create liberty interests protected by due process. *Hewitt v. Helms*, 459 U.S. 460, 470-472 (1983) (liberty interest in remaining in general prison population).

Also in the prison context, this Court has held that a prisoner's mere "expectancy" of release on parole is entitled to the protections of the due process clause. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979). More to the point of the instant case, these notions have prompted the majority of lower courts to conclude that where the state creates an entitlement to general assistance, to be based on the fulfillment of certain substantive conditions by applicants, some procedural protections are warranted. *See Gregory v. Town of Pittsfield, supra*, 470 U.S. at 1021-1022 (O'Connor, J.; dissenting from denial of *certiorari*); *see also* cases cited at 12, *supra*.

This view of the majority of lower courts applies with poignant significance in the case at hand, requiring

consideration by this Court. Not only are the benefits of the Federal Tort Claims Act generally available to Mrs. Tarpeh-Doe and her son to assist their recovery from injury at the hands of the government, but also in this case the terms of the Act are part of the terms of employment for Mrs. Tarpeh-Doe. Furthermore, the scheme of the Act and of its administrative regulations is conceptually more significant here than the general welfare statutes treated in the other circuits, since the scheme for consideration of foreign-origin tort claims acknowledges the justice of compensating victims of government negligence already inflicted. The issue is one of justice as opposed to largess.

Hence, it is entirely inappropriate to treat a government employee's rights on a par with those of prison inmates, as does the majority below. The benefits of the Tort Claims Act are extremely important to all government employees located overseas, as that Act is a compromise of sovereign immunity for the equitable compensation of employees wronged by agents of the Department of State and, indeed, is often the only mechanism by which such employees can become whole. Consequently, the Court is faced in this case with a scheme even more compelling than in those cases prompting members of this Court to encourage consideration of the rights due applicants for general benefits. *Lyng v. Payne*, *supra*, 476 U.S. at 942; *Gregory v. Town of Pittsfield*, *supra*, 470 U.S. 1018 (O'Connor, J.; dissenting from denial of *certiorari*); *Peer v. Griffith*, *supra*, 445 U.S. at 970 (Rehnquist, J.; dissenting from denial of *certiorari*).

On the other hand, the rights extended by Congress in this case are more similar to those contained in the federal legislation underlying this Court's decisions in *Schweiker v. McClure*, 456 U.S. 188 (1982), and *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985). In *McClure* the Court evaluated the fairness of a federally regulated scheme for the reimbursement through Medicare of incurred medical expenses. In that

instance, individual citizens had obtained medical treatment acting in reliance on compensation for that treatment through the Medicare claims process. In determining whether that system was procedurally fair, this Court did not even examine whether the Medicare program created a protectable property interest. That issue was assumed, *sub silentio.*

In *Walters* this Court considered whether the $10 statutory limitation of attorneys fees for representation of veterans seeking service-connected disability payments violated procedural due process. This Court reasoned that it need not consider the lower court's conclusion that a mere applicant for benefits has a "legitimate claim of entitlement" under the Constitution, since one of the four claimants in that case "alleged a diminution of benefits already received." *Walters,* 473 U.S. at 320 n.8. Had the Court reached that issue, it would have confronted a factual situation almost entirely identical to that at hand. Mrs. Tarpeh-Doe was an employee of the United States whose dependents, as a condition of her employment, were guaranteed the best possible medical care. Upon the injury to her son, Mrs. Tarpeh-Doe sought the benefits of the administrative mechanism of the Tort Claims Act. Her expectation—as it was the expectation of the claimants in *Schweiker* and *Walters*—was to receive a merit-based decision pursuant to the criteria set forth in the Department's regulations. Indeed, the Department in its written denial averred that its decision *was* merit-based. However, the absence of even minimal procedural protections and the secrecy in this case have raised the spectre that, contrary to petitioners' expectations and the Department's assurances, the Department's actions were completely arbitrary.

II. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH THIS COURT'S DECISION IN *LOGAN v. ZIMMERMAN*

This case is more compelling than the general benefits cases addressed in the lower courts for an additional reason. Here, Congress has waived the sovereign immunity of the United States to confer an administrative remedy upon persons injured abroad by the tortious conduct of the government. Such a right is more akin to a common law cause of action, historically viewed as a species of property, than it is akin to the liberty interests of prisoners. *See Martinez v. California*, 444 U.S. 277, 281-282 (1980); *Boddie v. Connecticut*, 401 U.S. 371, 379-380 (1971); *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 313 (1950).

This historical view of a cause of action as property obtained particular application to the instant case in this Court's decision in *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982). In that case, the State of Illinois had afforded to all employees in the state resort to the Fair Employment Practices Commission as a forum for claims of discriminatory discharge. Logan's petition before the Commission in that instance was dismissed because the Commission had failed to schedule a timely factfinding conference.

This Court noted that the Illinois statute had established a comprehensive scheme for adjudicating allegations of unfair discharge. The Court saw no meaningful distinction between the cause of action at issue in *Mullane v. Hanover Bank and Trust*, *supra*, and Logan's right to utilize the Commission's adjudicatory process. *Id.* at 429. Utilizing the rubric of *Board of Regents v. Roth*, *supra*, 408 U.S. at 571-572, this Court defined the Illinois process as an "individual entitlement . . . which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. at 430. Consequently, the dismissal of Logan's claim on account of the Commission's schedul-

ing error unfairly restricted Logan's enjoyment of that right in violation of the due process clause.

Similarly, if allowed to stand, the circuit court's decision in this case will permit an executive agency to eviscerate the administrative tort compensation scheme. Just as the Illinois court dismissed Logan's administrative claim based on the arbitrary time constraints contained in the act, under the lower court's analysis an executive agency is free to reject a meritorious tort claim without conducting a fact-based final evaluation. If the executive agency is permitted to interpret its obligations in derogation of the intent of the administrative scheme, then for all intents and purposes the scheme is meaningless, as the dissent below observed. Instead, the procedural obligations of the executive agency must be analyzed as a matter of federal constitutional law and not in the terms of judicial deference to an agency interpretation trotted out for litigation purposes. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 432.

The district court in this case, on the other hand, recognized this distinction and rejected the Department's assertion that it was free to cut off administrative tort claims for any reason or no reason at all.

> Given that the Department of State is authorized to pay citizens with claims of foreign origination and the Secretary has prescribed regulations to implement the statute and provide agency review for such claims, the right to bring such claims before the agency "cannot be dealt with arbitrarily."

App. at 22a, quoting from *Gerritson v. Vance*, *supra*, 488 F. Supp. at 267.[8]

---

[8] In an interim memorandum and order, the district court flatly rejected the Department's claim that "[t]he same statute and regulations that create a right to recover from the Government on tort claims provide the exclusive source of the procedures which govern the investigation and consideration of those claims at the administrative level." App. at 27a. The source of the proper procedures, of course, is the Constitution. *See* our argument, *infra*, at 25.

III. THE CIRCUIT COURT'S DECISION ENCOURAGES ARBITRARY TREATMENT OF CLAIMANTS FOR CONGRESSIONALLY-AUTHORIZED BENEFITS AND FLAUNTS THE INTENT OF CONGRESS TO COMPENSATE MERITORIOUS FOREIGN ORIGIN TORT CLAIMS AGAINST THE UNITED STATES

The principle error and danger in the majority decision of the circuit court lies in its deference to the Department's purported interpretation of its responsibilities under the Act of August 1, 1956, and the regulations promulgated pursuant thereto. To determine whether Congress intended to create an entitlement in the Act of August 1, 1956, the proper analysis for the manifestation of such intent is an examination of the Act, the implementing regulations, and the actual agency practice. However, rather than apply this Court's constitutional standard, the lower court blindly deferred to the Department's proferred view and concluded, "We cannot say . . . that the Secretary has erred in construing his own Regulations not to *require* the Department to pay claims *even* if the investigator determines that the claim is valid and recommends payment." App. at 8a-9a (emphasis in original).

The only evidence of the "Secretary's construing of his own Regulations" consists of a declaration of an Assistant Legal Advisor, the same individual who denied petitioners' claim. This declaration purported to construe not the regulations but rather Congress' own statute, 22 U.S.C. § 2669(f). Furthermore, this declaration was executed on October 6, 1989, almost five months after the decision of the district court, and was filed with the district court in a completely unrelated matter.

This asserted construction of the Act of August 1, 1956, is directly contrary to the historical evidence of the Department's own conduct with respect to foreign-origin tort claims. As the dissent points out, in 1983 the Department, in responding to an inquiry from Sena-

tor Robert Dole regarding the Department's denial of a foreign-origin tort claim, stated as follows:

> The Department is acutely aware of its responsibility to *adjudicate* medical negligence claims fairly and objectively.

App. at 45a (emphasis supplied). Thus, this historical evidence comports entirely with the district court's conclusion in this case that the process due petitioners must comport with the minimal procedures due in an "adjudication."

Further evidence of the Department's practice is available in this very case. The Department originally asserted and continued to assert in the circuit court that petitioners' claim was, indeed, evaluated on its merits:

> The Department considered the claimant's allegations of fact and law in light of the documents submitted by the claimant and in light of the facts and law as ascertained in the Department's own investigation. The Department has concluded that compensable negligence under the applicable legal standards has not been demonstrated. The claim is *therefore* denied.

App. at 32a (emphasis supplied).

Hence, the circuit court has wrongly deferred to agency interpretation in the face of "rules or mutually explicit understandings that support [petitioners'] claim of entitlement to the benefit." *Perry v. Sindermann*, 408 U.S. 598, 601 (1972).

A. Congress Intended that the FTCA and the Act of August 1, 1956 Provide a Merit-based, Tort Compensation Scheme

Not only is there no historical evidence of the Department's claim to complete discretion, but also such a view ignores the overwhelming evidence of congressional intent to compensate meritorious foreign-origin tort claims.

An examination of the purpose of the Act of August 1, 1956, reveals a comprehensive scheme established by Congress to compensate meritorious foreign-origin tort claims. Prior to passage of the Federal Tort Claims Act in 1946, the United States retained its sovereign immunity to deny liability for the torts of its agents and instrumentalities. The only remedy for injury suffered at the hands of the United States prior to 1946—whether arising in a domestic or foreign setting—lay in appeal to Congress for a "private bill." As the dissent below points out, the system of relying on private bills in Congress was unjust "in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on consideration of grace." App. at 12a, quoting H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2 (1945). Hence, the Federal Tort Claims Act was enacted "to avoid injustice to those having meritorious claims hitherto barred by sovereign immunity." *United States v. Muniz*, 374 U.S. 150, 154 (1963).

As the dissent correctly observes, since 1946 Congress has repeatedly fine-tuned the FTCA through subsequent amendments to further the settlement of meritorious tort claims against the United States. App. at 13a. Initially, the provisions of the FTCA specifically prohibited any consideration of claims arising "in a foreign country." 28 U.S.C. § 2680(k). Hence, an individual—whether a citizen or not—was denied any remedy under federal law should that person be injured by the act of an agent of the United States while in a foreign country.

During the post World War II expansion of United States' interests and activities abroad, the same notions of fairness underlying the FTCA began to surface with respect to the liability of the United States abroad. As a consequence of these notions, Congress enacted the Act of August 1, 1956, which affords an administrative consideration of foreign-origin tort claims against the Department of State. Congress specifically adopted the admin-

istrative mechanism of the FTCA for use by the Department in consideration of such tort claims. The only exception to wholesale adoption of the FTCA was that review of the Department's decision in a trial *de novo* was not provided. The only evidence of the underlying purpose of this limitation appears to have been to protect the Department of State from the uncertain applications of foreign law and the inconvenience of gathering witnesses from foreign lands. *United States v. Spelar*, 338 U.S. 217, 221 (1949). Nowhere is there any reservation of discretion to an agency head, other than the obvious inference that the decisionmaker has the flexibility to grant or deny a claim based on its merits. As additional evidence of the intent of Congress in this regard, in 1985 Congress did away with the requirement that the Secretary of State must make payment for foreign-origin tort claims only out of funds specifically appropriated for that purpose. By amendment, Congress provided that the Secretary may use funds appropriated "or otherwise available." Pub.L. No. 99-93, § 114 (1985). Thus, there is presently no limit on the size of an award.

That the administrative mechanism of the Act of August 1, 1956, was intended to be a merit-based system also is supported by the historical fact that the Act arose out of Congressional efforts to extend the administrative provisions of the FTCA to persons injured abroad by the acts of employees and agents of federal instrumentalities other than just the Department of State. *See* H.R. Rep. No. 2508, 84th Cong., 2d Sess. 9 (1956). For example, Congress has specifically authorized the payment of foreign-origin tort claims by the Director of the United States Information Agency (22 U.S.C. § 1474), the Administrator of Veterans' Affairs (38 U.S.C. § 236), the Attorney General in connection with the activities of the Drug Enforcement Administration (21 U.S.C. § 904), the Director of the Peace Corps (22 U.S.C. § 2509), the National Aeronautics and Space Administration (42 U.S.C. § 2473), the Secretary of Defense (10 U.S.C. § 2733) and the Sec-

retaries of the Army and Air Force (32 U.S.C. § 715), among others. *See also* 29 U.S.C. § 1706(b) (Job Corps); 39 U.S.C. § 2603 (Postal Service); and 42 U.S.C. §§ 2211 and 2212 (Nuclear reactors on warships). The legislative history of these enactments reflects the Congressional expectation that meritorious claims shall be paid.[9]

The majority's view that federal agencies charged with consideration of foreign origin tort claims may conduct those functions in a completely arbitrary and capricious manner is a directive to federal agencies to do just that.

B. Deference to an Executive Agency's Interpretation of its Own Statutory Obligations Denies Claimants the Protections of the Due Process Clause

Equally difficult to understand is the majority's resort to this Court's decisions in the context of the rights of prison inmates to ascertain the rights which an employee and citizen of the United States enjoys who is the victim of a tortious act. Citing to *Kentucky Dep't of Corrections v. Thompson*, 109 S.Ct. 1904, 1910 (1989), the majority searched the Department's regulations for " 'explicitly mandatory language,' i.e. specific directives to the decisionmaker that if the regulations' substantive predicates

---

[9] *See, e.g.*, S. Rep. No. 840, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 3811, 3815 ("the principle benefit which would accrue for the granting of authority for such settlements would be to make it possible for the prompt and equitable settlement of meritorious claims in foreign areas" by the Veterans Administration); H.R. Rep. No. 1115, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Admin. News 2842, 2858 ("Subsection 10(b) authorizes the payment of meritorious claims arising in foreign countries out of the acts or omissions of volunteers or Peace Corps employees"); H.R. Rep. No. 1770, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 3160, 3195 (authorizing the submission of "meritorious claims" in excess of the amount initially authorized for payment by NASA officials to be submitted to Congress for consideration).

are present, a particular outcome must follow." *Id.* App. at 7a.

This approach encourages courts to apply a formulation meant for prison inmates to citizens who enjoy a full measure of constitutional rights. This Court has made clear that prison inmates do not enjoy the benefits of the broad property rights analysis contained in *Board of Regents v. Roth*, *supra*, 408 U.S. 564, and *Perry v. Sindermann*, *supra*, 408 U.S. 598. In *Jago v. Van Curen*, 454 U.S. 14 (1981) (per curiam), the Court rejected application of the expanded property notions of *Roth* and *Perry* to the prison setting because "our penal systems need considerable latitude in operating those systems, and . . . the protected interests of prisoners are necessarily limited." *Id.* at 18. More recently, this Court held that the legitimacy of prison regulations is subject to a less rigorous standard of review than restrictions on the rights of other citizens. *Washington v. Harper*, 110 S.Ct. 1028, 1037-1038 (1990).

Even assuming the test of *Kentucky Dep't of Corrections v. Thompson* applies to this situation, the majority did not properly apply that test. In its search for "explicit mandatory language" in the Department's regulations, the majority first encounters the following:

> a Foreign Service establishment *shall* make such investigations as shall be necessary or appropriate for the determination of the *validity* of the claim.

22 C.F.R. § 31.6(b) (emphasis supplied). App. at 40a. Following such investigation, the Foreign Service establishment

> *shall* forward the claim together with all pertinent material, and a recommendation regarding allowance, or disallowance of the claim, to the Department for transmission to the requesting agency.

Id.

From this, the majority concludes that a claimant is entitled to have the claim investigated and "to have a recommendation regarding the validity of the claim forwarded to the official who will decide whether to pay the claim." App. at 8a. However, the majority concludes that since the regulations are *silent* as to the duties of the final decisionmaker, it is proper for the Department to interpret that silence as unrestricted discretion to grant or deny claims: or, as this Court has said, to deny claims "for whatever reason or for no reason at all." *Meachum v. Fano*, 427 U.S. 215, 228 (1976).[10]

By permitting arbitrary determinations by the Department in light of the "absence of language" in the regulations regarding the responsibilities of the decisionmaker, the lower court abdicates its responsibility on two scores. First, it abandons the "search for *relevant* mandatory language" mandated by this Court in the context of prisoner rights cases. *Kentucky Dep't of Corrections v. Thompson*, *supra*, 109 S.Ct. at 1910 n.4. Second, it abandons the judicial responsibility to interpret rights in the light of constitutional mandate in favor of the foresworn approach of "the bitter with the sweet" set forth in *Arnett v. Kennedy*, 416 U.S. 134 (1974), and specifically repudiated in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540-541 (1985):

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere

---

[10] Actually, the regulations do set forth the procedures for both granting a claim (22 C.F.R. § 31.9) and denying a claim (22 C.F.R. § 31.10). There are no provisions for granting or denying a claim based on any considerations other than merit.

> tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.

Id. at 541.

The "relevant mandatory" language of the administrative claims scheme makes clear that claimants have an entitlement to a factual, merit-based decision undertaken pursuant to well-known common law tort standard. While the Act of August 1, 1956, indeed states that the Secretary "may pay tort claims," it also limits that authority to "the manner authorized in the first paragraph of section 2672 . . . of title 28," the Federal Tort Claims Act. Section 2672 provides that the agency head "may consider, ascertain, adjust, determine, compromise, and settle any claim . . . for injury . . . *under circumstances where the United States, if a private person, would be liable to the claimant* in accordance with the law of the place." App. at 34a (emphasis supplied). Even this language presupposes a merit-based tort compensation system.

Moreover, as the dissent below points out, of critical importance is the "crucial sentence" of the Department's own regulations contained in section 31.18 of Title 31:

> [T]he Federal Tort Claims Act and Subpart B of this part are applicable to claims filed under the act of August 1, 1956, except that no provision has been made in that act for the institution of suit if a claim is denied.

22 C.F.R. § 31.18. App. at 43a. Consequently, the Department's own regulations incorporate the essential "fairness" provision of the FTCA which provides that

> The United States *shall be liable*, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.

28 U.S.C. § 2674. App. at 35a.

It was entirely improper for the majority in the circuit court to defer to the Department's own interpretation of the statute in derogation of clear congressional intent. *See SEC v. Sloan*, 436 U.S. 103, 117-121 (1978). Indeed, it is difficult to conceive of any rational reason why the Department should be free to deny meritorious claims.

C. The Procedures Afforded Petitioners by the Department of State Create the Highest Risk of an Erroneous Decision

At oral argument in the circuit court, the Department claimed that the decisionmaker in a foreign-origin administrative tort claim could render a decision based on the toss of a coin. App. at 11a. While a claimant under the Act of August 1, 1956, is required to comply with all manner of formality, 22 C.F.R. § 31.4, the Department did not provide access to any evidence or an opportunity to rebut that evidence. It is clear that when the Secretary of State promulgated these regulations, no accommodation was made to the fact that a post-denial trial *de novo* was not available for foreign-origin claimants. In practice, no effort is made to accommodate the rights of claimants injured in a foreign country by providing even minimal procedures in lieu of a trial *de novo*.

This Court has never expressly upheld any procedure finally disposing of a liberty or property claim in the manner utilized here by the Department of State. *See Gray Panthers v. Schweiker*, 652 F.2d 146, 161 (D.C. Cir. 1980). The risk of an erroneous decision is obviously at its highest under the process sponsored by the Department of State here. Consequently, the minimal remedial procedures proposed by the district court were entirely appropriate. *See Logan v. Zimmerman, supra*, 455 U.S. at 434-435.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for *certiorari*.

Respectfully submitted,

JOHN JUDE O'DONNELL *
RANDELL HUNT NORTON
JOSEPH MICHAEL HANNON, JR.
THOMPSON, MCGRAIL, O'DONNELL & HARDING
730 15th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-2244
Attorneys for Petitioners

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 7, 1990 Decided June 8, 1990

No. 89-5210

LINDA WHEELER TARPEH-DOE, *et al.*,
Appellees

v.

UNITED STATES OF AMERICA, *et al.*,
Appellants

Appeal from the United States District Court
for the District of Columbia
(Civ. Action No. 88-0270)

Wilma A. Lewis, Assistant United States Attorney, with whom *Jay B. Stephens*, United States Attorney, *John D. Bates* and *Craig Lawrence*, Assistant United States Attorneys, and *H. Rowan Gaither*, Attorney, United States Department of State, were on the brief, for appellants.

Joseph Michael Hannon, Jr., with whom *John Jude O'Donnell* and *Randell Hunt Norton* were on the brief, for appellees.

Before: WALD, *Chief Judge*, and MIKVA and BUCKLEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

Dissenting Opinion filed by *Chief Judge* WALD.

MIKVA, *Circuit Judge*: The government appeals the trial judge's order granting partial summary judgment to Linda Wheeler Tarpeh-Doe, and requiring the Agency for International Development to supplement its consideration of Tarpeh-Doe's administrative tort claim with certain procedural protections dictated by the court. Because we conclude that the statutes and regulations governing the consideration of such claims do not, standing alone, generate a protected interest implicating the requisites of due process, we reverse.

I

Appellee Linda Wheeler Tarpeh-Doe, an International Development Intern with the Agency for International Development, was assigned to the U.S. Embassy in Monrovia, Liberia in 1981. On May 18, 1982, appellee gave birth to Nyenpan Tarpeh-Doe II. Shortly after birth, the baby became very ill, and Dr. Lefton, the embassy physician who examined the baby, ordered that the child be evacuated immediately to the United States. Later that day, however, Dr. Lefton had the baby examined by Dr. Van Reken, an American missionary physician, who ordered the baby transferred—over appellee's objections—to a Liberian hospital. Dr. Van Reken also withdrew the order to evacuate the baby. The baby's condition did not improve over the following two weeks, and he was evacuated to the United States on June 17, 1982. The child is presently institutionalized in Denver; he is blind and may suffer permanent brain damage.

Alleging negligence by State Deartment officials both in Liberia and the United States, appellee filed an administrative claim with the Department of State on January 31, 1984. As part of the ordinary administrative process, appellee's claim was transferred to the Office of Assistant Legal Adviser for International Claims and Investment Disputes, where the claim was initially reviewed by

the Office of Medical Services. A supervisory claims attorney, H. Rowan Gaither, investigated the claim. He conducted interviews with persons familiar with the case, consulted with outside experts, and reviewed relevant documents. Following his investigation, Gaither met with appellee's counsel. The government asserts that Gaither explained at this meeting the government's preliminary conclusions and the reasons supporting them, and told appellee's counsel that the facts did not support appellee's claim for compensation. Gaither then forwarded his recommendation for disposition of this claim to the Assistant Legal Adviser for International Claims and Investment Disputes, Ronald Bettauer. In turn, Bettauer issued a formal denial of appellee's claim in a letter dated October 9, 1987. The letter contained no legal or factual determinations supporting the Department's conclusions.

Following this administrative denial, appellee brought suit in district court under the Federal Tort Claims Act ("FTCA") against the United States and the Secretary of State. The complaint also alleged that the procedures for deciding appellee's administrative claim violated the due process clause of the fifth amendment.

In two separate orders, the district court dismissed two counts of appellee's four-count complaint. In both orders, the court stated that the State Department's administrative action was an adjudication that implicated the fifth amendment's due process clause. In the second of these orders, the court invited appellee to file a motion for partial summary judgment on her claim that the administrative procedures used by the Department in processing her claim violated due process. Appellee filed this motion, and the district court granted partial summary judgment for the plaintiff in a Memorandum and Order dated May 10, 1989 ("May 10 Order").

In reaching its decision, the district court recognized that by the terms of the governing regulations, the State Department was not obliged to accord the appellee any

procedures beyond those that it had already provided in this case. The court noted that the relevant statutes and regulations do not require the Department to state its reasons, identify the evidence it relied upon, or even list the witnesses that it interviewed in formulating its decision to deny relief. After a full review of this administrative scheme, the district court concluded that the existing procedures for assessing claims against the United States arising in foreign countries violate the

> "relatively immutable principle" that administrative action on [an individual's] claim must be based on fact findings and that "the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

May 10 order at 6 (quoting *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

In its grant of summary judgment, the court remanded the administrative claim to the State Department for reconsideration, and required the Department to

> (1) disclose to plaintiffs the evidence relied upon in the original denial of their claim and to be relied upon in reconsideration of it, (2) afford plaintiffs an adequate opportunity to comment on and counter that evidence, and (3) make and provide to plaintiffs findings of fact that address the evidence relied upon by the decisionmaker in the original decision and the reconsideration of it, and any comment or counter submitted by plaintiffs in response to evidence disclosed to them.

May 10 Order. In fashioning these procedures, the trial court balanced the appellee's "life and liberty interest in being treated safely by the United States medical personnel abroad" against what it found to be the lack of a "rational government interest in a general rule that precludes citizens injured abroad from knowing the evidence

used against them and that cuts off the constitutional right that plaintiffs here assert." May 10 Order at 7-8. The court concluded that

> [a]bsent any specific claim for need of confidentiality, plaintiffs should know the evidence relied on in rejecting their claim and should be given an opportunity to show that it is untrue.

Id. at 8.

II

The legislative and administrative scheme governing appellee's claims begins with the FTCA, which provides in relevant part that

> [t]he head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the agency . . . .

§ 2672 (1989). Although the FTCA further provides that the foregoing provisions do not apply to "[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k), Congress provided in the Act of August 1, 1956 that the Secretary of State may "pay tort claims, in the manner authorized in the first paragraph of section 2672, as amended, of Title 28, when such claims arise in foreign countries in connection with Department of State operations abroad." 22 U.S.C. § 2669(f) (1990).

Pursuant to this authorization, the Secretary of State has promulgated regulations (the "Regulations") establishing procedures for investigating and determining tort claims arising abroad. The Regulations detail the procedures for filing a claim, presenting evidence in connection with a claim, conducting the administrative investigation, and ultimately resolving the claim. *See* 22 C.F.R., Part

31 (1989). The section governing the final denial of claims provides that

> [f]inal denial of an administrative claim shall be in writing and sent to the claimant, his or her attorney, or legal representative by certified or registered mail. Except in the case of claims arising in foreign countries, the notification of final denial shall contain a statement that if the claimant is dissatisfied with the decision, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

22 C.F.R. § 31.10. Significantly, apart from the notice of a right of action for claims arising in the United States, this provision establishes no guidelines for the statement of denial. Similarly, the sections governing investigation and determination of claims arising in foreign countries state only that

> a Foreign Service establishment shall make such investigations as may be necessary or appropriate for the determination of the validity of the claim arising outside the United States, and thereafter shall forward the claim, together with all pertinent material, and a recommendation regarding allowance or disallowance to the requesting agency.
>
> . . . .
>
> Claims will be determined in accord with the applicable statute and the applicable part of this subpart.

22 C.F.R. §§ 31.6(b), 31.7. Thus, the Regulations do not require the official making the final decision whether to allow the claim to accede to the recommendation of the investigating officer.

As noted, the trial judge recognized that neither the governing statutes nor the Regulations directly require any procedures beyond those afforded the appellee in this case. Rather, the court found that the overall structure

of the scheme governing the disposition of these claims triggered a *constitutional* right to the additional procedures ordered. Although the Constitution does require some procedural due process protections in proceedings involving constitutionally protected interests, we conclude that the relevant statutes and regulations do not, without more, create an interest that justifies the imposition of the supplemental procedures.

The Supreme Court has stated that individuals asserting a constitutional right to certain procedures must demonstrate that they have been deprived of a protected liberty or property interest. Protected interests are those to which a claimant has a legitimate entitlement; a mere expectancy grounded in "an abstract need or desire" is insufficient to trigger the protections of the due process clause. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court has held that such entitlements may derive from statutes and regulations restricting the exercise of official discretion. Whether a given statutory scheme gives rise to a protected interest depends on whether the authority promulgating the statute or regulation has placed *substantive* limits on official discretion. *See Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). Addressing the limitations necessary to support such an entitlement, the Court has stated that "the regulations [must] contain 'explicitly mandatory language,' i.e., specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow . . . ." *Kentucky Dep't of Corrections v. Thompson*, 109 S. Ct. 1904, 1910 (1989).

The government contends that because Congress's grant of authority to the Secretary of State to pay tort claims arising abroad was permissive, *see* 22 U.S.C. § 2669(f) ("The Secretary of State *may* . . . pay tort claims . . . aris[ing] in foreign countries . . . .") (emphasis added), the Secretary's discretion is unbounded and cannot provide the basis for any claimed entitlement to procedures.

It is clear that the plain language of § 2669(f) does not give a claimant the right to demand either payment of tort claims or procedures for the consideration of such claims. It is similarly beyond cavil, however, that the Secretary has limited his inherent discretion by promulgating the Regulations. Pursuant to the above-cited Supreme Court precedent, therefore, we must determine whether the Regulations provide criteria for the evaluation of claims which, if met, require the Secretary to pay these claims.

Although the Secretary is not statutorily required to entertain any tort claims arising in foreign countries, he has limited his discretion by providing in the Regulations that if a claimant complies with certain explicit filing requirements, "a Foreign Service establishment *shall* make such investigations as shall be necessary or appropriate for the determination of the validity of the claim . . . ." 22 C.F.R. § 31.6(b) (emphasis added). Following such investigation, the Foreign Service establishment "*shall* forward the claim together with all pertinent material, and a recommendation regarding allowance or disallowance of the claim, to the Department for transmission to the requesting agency." *Id.* (emphasis added). Thus, an individual who properly files a claim is *entitled*, under the Regulations, to have the claim investigated and to have a recommendation regarding the validity of the claim forwarded to the official who will decide whether to pay the claim.

Unfortunately for the appellee, however, this is where the chain necessary to her claim of entitlement ends. As noted, the Regulations nowhere provide that the decisionmaker must comply with the recommendation prepared by the officer investigating the claim's validity or, alternatively, that the decisionmaker must provide a statement of reasons for not following the investigator's recommendation. We cannot say, therefore, that the Secretary has erred in construing his own Regulations not to

require the Department to pay claims *even* if the investigator determines that the claim is valid and recommends payment. *Cf. General Carbon Co. v. OSHRC*, 860 F.2d 479, 483 (D.C. Cir. 1988) ("An agency's interpretation of its own regulations will be accepted unless it is plainly wrong."). Under this construction, the Regulations fail to restrict sufficiently the decisionmaker's discretion to generate a protected interest implicating the due process clause. Likewise, the Supreme Court has foreclosed appellee's argument that the mere complexity of the Regulations may serve to create an entitlement triggering due process. *See Hewitt v. Helms*, 459 U.S. 460, 471 (1983) (rejecting the argument that the creation of "a careful procedural structure to regulate the use of administrative segregation . . . indicates the existence of a protected liberty interest").

III

Although the parameters of procedural due process are far from certain, the Supreme Court has directed that one claiming the right to certain procedures under the Constitution must have been deprived of an interest grounded in a legitimate expectation. Here, neither the governing statutes nor the Regulations provide a sufficient basis for the district court's conclusion that the administrative scheme for handling tort claims arising abroad implicates the due process clause and justifies the imposition of the additional procedures the court required in its order.

It bears emphasis that we hold only that the language of the statutes and regulations at issue does not, *without more*, support the district court's ruling. We have not been presented with evidence of the Department's past practice in dealing with claims. It is possible, of course, for a legitimate expectations to arise based upon the consistent practice of a decisional body—even in the absence of express regulatory language or in the face of ostensibly contradictory agency policy statements. *See Perry v. Sindermann*, 408 U.S. 593, 601-03 (1972).

That the Regulations are prone to misconstruction is beyond doubt. That the "procedure" established by the Regulations is suitable to Lilliput is equally beyond doubt. But, the determination not to create substantive rights or fair procedures or even clear regulations is one for the Secretary to make. Thus, although we share the dissent's discomfort with the result in this case, the foregoing Supreme Court precedent bars this court from ordaining a better result where the Secretary has not established a better process than the Constitution or the governing statute requires.

The decision of the district court is reversed and the matter is remanded to the district court for further proceedings consistent with this opinion.

WALD, *Chief Judge*, dissenting: I respectfully dissent from the majority's conclusion that the Regulations governing the handling of Linda Wheeler Tarpeh-Doe's medical malpractice claim do not impose any obligation on the agency to determine her claim on the merits, and in accord with minimal due process.

Although the Secretary of State ("Secretary") is not required under the Federal Tort Claims Act ("FTCA") to entertain tort claims arising in foreign countries, he has, pursuant to authority granted him in a separate statute, 22 U.S.C. § 2669(f), issued Regulations to govern the investigation and determination of foreign claims. *See* 22 C.F.R., Part 31. The majority, however, finds that those Regulations in no way restrict the Secretary's discretion to deny or grant those claims on non-merit grounds. As government counsel candidly admitted at oral argument, the Department of State ("Department") feels that as long as the procedures set out in the Regulations are literally followed, the agency decisionmaker could ultimately decide after years of investigation and thousands of submissions by the claimant whether to grant or deny a claim by merely flipping a coin; thus, they cannot give rise to a protected interest or entitlement implicating the due process clause.

I find such a crabbed reading of the Regulations to make little or no sense. The Regulations need not and should not reasonably be read to permit the Department to deny a meritorious claim for an indefensible reason, or for no reason at all.

Nowhere in the statute or legislative history authorizing settlement of claims is there any indication that Congress intended to permit agencies to act arbitrarily in granting or denying tort claims. Indeed such a suggestion seems so counterintuitive as hardly to merit discussion, even though in fact it is the linchpin of the majority's decision. All indications point in the opposite direction: When Congress provided agencies with the ability

to settle FTCA claims administratively, it assumed a merit-based, tort compensation system—a system that would make the United States liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

The FTCA itself was enacted out of a sense that simple justice demanded that individuals be allowed to recover for torts committed against them by the federal government. *See* H.R. Rep. No. 1287, 79th Cong., 1st Sess. 7 (1945);[1] H.R. Rep. No. 2428, 76th Cong., 3d Sess. 8 (1940); *United States v. Muniz*, 374 U.S. 150 (1962) (Act designed in part to avoid injustice to those having meritorious claims hitherto barred by sovereign immunity). In the FTCA's statement of purpose, Congress indicated

> a desire on the part of the federal government in the interests of justice and fair play to permit a private litigant to satisfy his legal claims for injury or damage suffered at the hands of a United States employee acting in the scope of his employment.

See Committee on the Office of Attorney General, National Association of Attorneys General, *Sovereign Immunity: The Tort Liability of Government and Its Officials* 43 (1979). Congress clearly intended by the FTCA to create a system through which meritorious claims would be paid. In the 1945 House Report, for example, the Act's proponents said that the existing system of relying on private bills in Congress was unjust "in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on consideration of grace." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2 (1945). The Act's opponents in turn vowed that the mem-

---

[1] H.R. Rep. No. 1287 accompanied H.R. 181, 79th Cong., 1st Sess. (1945). The FTCA, virtually identical in form, was passed by the Second Session of the 79th Congress as Title IV of the Legislative Reorganization Act of 1946.

bers of Congress would be denied the right to determine the merits of a tort claim because that "right and power will be vested in the heads of departments and agencies of Government and in the courts." *Id.* at 13.

This theme of justice, fair play, and merit-based determinations echoes through the later amendments to the FTCA, which authorized administrative settlements. In 1966, for example, Congress authorized agencies to administratively settle tort claims in excess of the previous $2,500 limit in order to provide a "more fair and equitable treatment for private individuals and claimants when they deal with the Government," H.R. Rep. No. 1532, 89th Cong., 2d Sess 5 (1966), and to enable "claimants who have meritorious claims against the Federal Government to have them disposed of more expeditiously," by "facilitat[ing] their settlement through the use of administrative law procedures." 112 Cong. Rec. 12,259 (June 6, 1966); 112 Cong. Rec. 14,376 (June 27, 1966). Although there is little legislative discussion of the law extending administrative settlement authority to the Department for foreign-based claims, Congress almost certainly expected the same equity principles to govern the administrative settlement of both foreign and domestic claims. *See* H.R. Rep. No. 2508, 84th Cong., 2d Sess. 9 (1956).

Indeed, the Department in the past has acknowledged publicly its obligations administratively to carry out the justice purposes of the FTCA. A 1983 letter responding to an inquiry from Senator Robert Dole about a constituent's tort claim stated explicitly that the Department has a "responsibility to adjudicate medical negligence claims fairly and objectively." Plaintiffs' Motion for Partial Summary Judgment on Count IV of Amended Complaint, Exhibit A. A fair and objective *adjudication* certainly implies more than a coin flip.

To be sure, Congress originally exempted tort claims arising in foreign countries from the reaches of the FTCA

altogether. 28 U.S.C. § 2680(k). But, as the majority and the Department recognize, the Act of 1956 and the promulgation of the Department's own Regulations pursuant thereto now make foreign-originated claims fully cognizable for administrative settlement purposes. *See* 22 U.S.C. § 2669(f);[2] 22 C.F.R. § 31.18. The issue posed starkly by this case is whether those Regulations require the Secretary to pay meritorious claims. I believe that they do; a contrary reading is at best a strained one and at worst a cruelly deceptive one.

In subpart C of the Regulations, the Department authorizes the Secretary to pay tort claims "in the manner authorized in the first paragraph of 28 U.S.C. § 2672, as amended, when claims arise in foreign countries." 22 C.F.R. § 31.18. Section 2672 in turn provides the authority for settling tort claims by administrative agencies "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. . . ." Section 31.18 continues with a crucial sentence. It says that,

> the *Federal Tort Claims Act* and Subpart B of this part are applicable to claims filed under the act of August 1, 1956, except that no provision has been made in that act for the institution of suit if a claim is denied.

22 C.F.R. § 31.18 (emphasis added).[3] Thus, critically, the specific part of the Regulations (subpart C) dealing with

---

[2] 22 U.S.C. § 2669 provides that:

> The Secretary of State may use funds appropriated or otherwise available to the Secretary to—
>
> (f) pay tort claims, in the manner authorized in the first paragraph of section 2672, as amended, of Title 28 of the United States Code when such claims arise in foreign countries in connection with Department of State operations abroad.

[3] The majority discusses these Regulations as they apply to claims arising abroad. However, the main body of the Regulations

foreign claims incorporates the principles of the entire FTCA, not just § 2672, with the sole exception of the right of judicial review. And, of course, under § 2674 of the FTCA:

> The United States *shall be liable*, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.

28 U.S.C. § 2674 (emphasis added); *see also Prosser & Keeton on the Law of Torts*, § 131, at 1034 (5th ed. 1984) (describing § 2674 as "general directive" of FTCA). The waiver of sovereign immunity in the FTCA, then, imposes substantive criteria on FTCA determinations that mandate the same result as if a private individual were being sued under similar circumstances. *See* 22 C.F.R. subpart B, § 31.12 (tort claims are allowable under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred).

In sum, then, the Regulations do explicitly and implicitly assume that an administrative claim, foreign or domestic, will be decided on the same legal and equitable principles that govern court determinations. Otherwise, they must be read as providing superhighway procedures leading nowhere; paper promises designed to sidetrack the intent of Congress and to mislead the supplicant who invokes them. *See, e.g.*, 22 C.F.R. §§ 31.4, 31.6, 31.7. Admittedly, the Regulations do not themselves specify that the ultimate decisionmaker comply with the recommendation prepared by the investigating officer, or even that the decisionmaker provide a statement of reasons

---

(subparts A and B) applies to both domestic and foreign claims. Therefore, the majority's interpretation of the Regulations as not giving rise to any expectation of non-arbitrary treatment applies to both domestic and foreign claims, a problematical result at best. Domestic claimants are of course, permitted to try again in district court.

for denying the claim. *See* 22 C.F.R. §§ 31.6, 31.10. Nevertheless, they most definitely do incorporate the principle of § 2674 that liability will attach under similar circumstances as in a private sector claim. And, that is sufficient to provide the kind of entitlement to which minimal due process protections must be accorded. *See Olim v. Wakinekona*, 461 U.S. 238, 249 (1983).

The Department argues that it must be allowed to take foreign policy interests into account in disposing of foreign tort claims. *See* Supp. Decl. of Ronald J. Bettauer at ¶ 5, J.A. at 97-98. Possibly, the Department could have incorporated some such discretion into its administrative decisionmaking under its Regulations. But, that is not how the Regulations are presently written. Right now, subpart C of the Regulations contains only one exception to the applicability of the FTCA—a foreign tort claimant is not entitled to go to court if a claim is administratively denied. The Regulations most assuredly do not say that a claimant may be led down the yellow brick road of "thorough investigation," only to be faced at the end with a wizard-like administrator flipping coins behind a screen.

I would affirm the district court's imposition of minimum due process procedures on the administrative process by which foreign-based FTCA claims are denied.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 88-0270-LFO

LINDA WHEELER TARPEH-DOE, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

May 11, 1989

John Jude O'Donnell and Randell Hunt Norton, Thompson, Larson, McGrail, O'Donnell & Harding, Washington, D.C., for plaintiffs.

Wilma A. Lewis, Asst. U.S. Atty., Washington, D.C., for defendants.

MEMORANDUM

OBERDORFER, District Judge.

This case involves the claim of Linda Wheeler Tarpeh-Doe, employed by the Agency for International Development ("AID"), and her infant daughter. The mother was assigned in 1981 to the U.S. Embassy in Monrovia, Liberia, married Nyenpan Tarpeh-Doe, and on May 18, 1982, gave birth in a clinic in Monrovia to Nyenpan Tarpeh-Doe II, the minor plaintiff in this action. On the morning of June 5, 1982, the baby "became rigid," Sec-

ond Amended Complaint at ¶ 5, and his mother brought him immediately to embassy physicians. Following examination, an embassy physician informed plaintiff that the baby would be medically evacuated to the United States that night. Later in the morning, however, an American missionary physician conducted a further examination, ordered the baby transferred to a Liberian hospital, over the objection of plaintiff, and withdrew the approval to evacuate the baby. Plaintiff continued to demand evacuation, as originally recommended. The baby's condition remained unimpróved, and on June 17, 1987, evacuation was finally effected.

In a United States hospital, the baby's illness was correctly diagnosed, and treatment undertaken. The child is presently institutionalized in Denver, Colorado; he is blind, and may suffer permanent brain damage. Plaintiff claims that she was never informed of the practice for State Department and AID employees to be permitted to deliver their babies in the United States, an option which she would have chosen had she known of its existence.

On January 31, 1984, plaintiffs filed an administrative claim with the Department of State for damages and injury. Upon its denial, they filed an action here against the United States and the Secretary of State for negligence and for denial of due process. Now before the court is plaintiffs' claim that the procedure followed by defendant in reviewing plaintiffs' out-of-country claims violates even minimal due process requirements.

Memoranda filed October 25 and December 22, 1988, concluded that the defendant's administrative decision that plaintiff was not entitled to relief was an adjudication that implicated the Due Process Clause of the Fifth Amendment. The December 22 Memorandum observed that "in an adjudication the parties are entitled to know and have an opportunity to address the evidence to be

used by the adjudicator in making his decision." Memorandum of December 22, 1988 at 2. The Memorandum invited the plaintiff to file a motion for partial summary judgment "with a view to a direction to defendants to proceed to reconsider plaintiffs' foreign claim after disclosing the evidence to be relied on in that adjudication and affording them an adequate opportunity to comment on and counter that evidence." *Id.* Plaintiffs have filed such a motion, defendant has opposed it, and plaintiffs have replied.

Plaintiffs' motion supports the observation of the December 22 Memorandum with tangential, but persuasive, authority. In *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), the Supreme Court invalidated a Defense Department order debarring an employee from access to classified information without a hearing at which he would be afforded an opportunity to confront and cross-examine witnesses. The Court ruled that neither Congress nor the President had delegated to the Defense Department the authority to deny petitioner "these traditional and well recognized rights." The Court described these rights with emphasis:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . .

Greene, 360 U.S. at 496, 79 S.Ct. at 1413. The Court there stated:

> [B]efore we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be con-

> fronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use.

Id. at 507, 79 S.Ct. at 1419. The Court continued:

> [Such decisions] must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be regulated by default to administrators who, under our system of government, are not endowed with authority to decide them.
>
> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process.

Id. (citations omitted).

The administrative procedure challenged by plaintiffs here raises questions addressed by the Supreme Court in *Greene*. Here, Congress has authorized federal agencies "in accordance with regulations prescribed by the Attorney General, [to] consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the agency . . ." 28 U.S.C. § 2672. Congress has further provided authority for the Secretary of State to "pay tort claims in the manner authorized in . . . section 2672, as amended, of Title 28, when

such claims arise in foreign countries in connection with Department of State operations abroad." 22 U.S.C. § 2669(f). Congress has thus specifically authorized the Secretary of State to settle administratively claims of foreign origination.

In response to this statutory authorization, the Secretary of State has promulgated regulations, establishing procedures for the administration of such claims. The regulations, codified in 22 CFR Part 31, have the purpose

> to establish and provide a procedure for the preparation and submission of claims for personal injury . . . and to authorize certain officers of the Department of State . . . to consider, ascertain, adjust, determine, and settle such claims.

22 CFR 31.1. That chapter provides that

> claims for personal injury may be filed by the injured person, his or her duly authorized agent or legal representative . . . [and] [c]laims arising in foreign countries should be prepared in form of a sworn statement. . . .

22 CFR 31.4. The regulations provide that Department of State officials will then conduct an investigation, and either make a payment to the claimant, or send the claimant a final denial notification. Final denial

> shall be in writing and sent to the claimant, his or her attorney, or legal representative by certified or registered mail. Except in the case of claims arising in foreign countries, the notification of final denial shall contain a statement that if the claimant is dissatisfied with the decision, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

22 CFR 31.10. Under these regulations, U.S. citizens with claims arising in the United States have the option

of filing an action in court withn 6 months of the administrative decision, i.e. a plenary bench trial *de novo*. U.S. citizens with claims arising in foreign countries, however, may receive only a notice of final denial, with no statement of reasons, no indication of the evidence relied on, and no list of witnesses interviewed. No statute specifically authorizes any *de novo* trial or judicial review of the denial of a tort claim arising in a foreign country. However, conspicuously absent from 28 U.S.C. § 2672 or 22 U.S.C. § 2669(f), governing administrative action on claims arising abroad, is any provision that purports to preclude or evidences any intention by Congress to deny a claimant protection of the "relatively immutable principle" that administrative action on his claim must be based on fact findings and that "the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene*, 360 U.S. at 496, 79 S.Ct. at 1413.

Given that the Deparment of State is authorized to pay citizens with claims of foreign origination and the Secretary has prescribed regulations to implement the statute and provide agency review for such claims, the right to bring such claims before the agency "cannot be dealt with arbitrarily." *Gerritson v. Vance*, 488 F.Supp. 267 (D.Mass.1980). Furthermore, unless otherwise explicitly indicated by statutory authority, it must be assumed that Congress intended to afford those affected by administrative action the "traditional safeguards of due process." *Greene, supra* 360 U.S. at 507, 79 S.Ct. at 1419. Claimants injured in the United States by the United States have the full panoply of constitutional procedures (other than a jury trial) in a *de novo* action in federal court. 22 CFR 31.10. But even if there is justification for Congress' decision not to submit the United States to *de novo* lawsuits by citizens whom it injures abroad, it does not follow that Congress intended, or

could constitutionally intend, that the Executive Branch administer these citizens' claims without recognition of the "relatively immutable principle" that requires disclosure of evidence and "an opportunity to show that it is untrue." *Greene, supra* at 496, 79 S.Ct. at 1413.[1] The due process clause, of course, does not require a trial-type hearing in every instance. What procedures are due depends on the nature of the government function involved and the private interest being affected. *Goldberg v. Kelly*, 397 U.S. 254, 262-63, 90 S.Ct. 1011, 1017-18, 25 L.Ed.2d 287 (1970); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961).

The balance here between the private interest affected and the government function involved commands at last some minimal due process procedures. Plaintiffs, a mother employed by the United States in a foreign country and her baby, have a life and liberty interest in being treated safely by United States medical personnel abroad. Furthermore, the administrative provisions created by Congress established at least a right of U.S. citizens injured abroad to bring claims of foreign origination. Defendants, however, have failed to demonstrate in exposition of these regulations or in their application in this case, *any* rational governmental interest in a general rule that precludes citizens injured abroad by the United States from knowing the evidence used against them and that cuts off the constitutional right that plaintiffs here assert. Defendants have alleged no rational relation between the foreign situs of an alleged United States tort against one of its citizens and the refusal to afford that citizen at least a modicum of due process. Nor

---

[1] Examination of the legislative history of 22 U.S.C. § 2669(f) discloses no indication that Congress intended to deprive citizens with claims of foreign origination of any fundamental due process rights. *See* H.R.Rep. No. 2508, 84th Cong., 2d Sess. 9 (1956) U.S. Code Cong. & Admin.News 1956, p. 4017.

have defendants alleged any invocation of foreign law or any implication of foreign relations in connection with this matter. Indeed, in a related context, the Supreme Court has vigorously rejected "the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 5, 77 S.Ct. 1222, 1224, 1 L.Ed.2d 1148 (1957) (U.S. citizen not in military entitled to jury trial for murder committed on U.S. military base abroad). *See also Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144 (D.D.C. 1976) (Fourth Amendment bars warrantless wiretapping by U.S. Army of U.S. citizens abroad). Absent any specific claim for need of confidentiality, plaintiffs should know the evidence relied on in rejecting their claim and should be given an opportunity to show that it is untrue.

Accordingly, the Secretary must reconsider this claim consistently with minimal due process requirements. While an oral hearing might impose substantial practical problems of locating witnesses and would probably not aid plaintiff significantly in presenting her case, the additional procedure of informing plaintiffs in writing of the evidence relied on in determining the merit of their claim and allowing them the opportunity to show in writing that evidence is untrue would satisfy plaintiffs' procedural rights here.

In reaching this conclusion, the court has carefully considered the Supreme Court opinion in *Lehman v. Nakshian*, 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). That case, involving an age discrimination claim against the government, did not implicate any delegation of authority or promulgation of regulations. This case involves the different question of whether the defendant's application of the regulations governing claims of foreign origination deprive these plaintiffs of a bare constitutional right, as defined in *Greene*. Accordingly, an accompanying order will grant plaintiffs' motion for summary judgment on Count IV of the complaint. Since

damages for denial of claimants' procedural rights would plainly be inadequate, an equitable remedy is appropriate. The *Greene* decision suggests the appropriate one: a direction to defendant to reconsider plaintiffs' claims after disclosing to them the evidence relied upon by the Secretary's delegate in denying their claim and to be relied upon in the reconsideration, to afford plaintiffs an opportunity to show that the evidence is untrue, and to make findings of fact or otherwise address the evidence relied upon and to be relied upon by the decisionmaker and any comment or counter submitted by plaintiffs in response to the evidence disclosed to them.

ORDER

For reasons stated in the accompanying Memorandum, it is this 10th day of May, 1989, hereby

ORERED: that plaintiffs' motion for summary judgment on Count IV is hereby granted; and it is further

ORDERED: that proceedings on Count I are hereby stayed pending an administrative action on Count IV; and it is further

ORDERED: that defendants shall, on or before September 30, 1989, reconsider plaintiffs' claim in the manner contemplated by the accompanying Memorandum, i.e. (1) disclose to plaintiffs the evidence relied upon in the original denial of their claim and to be relied upon in reconsideration of it, (2) afford plaintiffs an adequate opportunity to comment on and counter that evidence, and (3) make and provide to plaintiffs findings of fact that address the evidence relied upon by the decisionmaker in the original decision and in the reconsideration of it, and any comment or counter submitted by plaintiffs in response to the evidence disclosed to them.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0270-LFO

LINDA WHEELER TARPEH-DOE, *et al.*,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants.

MEMORANDUM

[Filed Oct. 25, 1988]

This case is before the court on defendants' Motion to Dismiss or for Partial Summary Judgment on Counts II, III, and IV. In Count IV, plaintiffs contend that denial of their foreign origins claim was arbitrary and capricious. Plaintiffs claim, without contradiction, that defendants never furnished them any list of the witnesses whom they had consulted or the substance of their testimony. Plaintiffs' contention focuses on the denial of identification of, and access to, expert witnesses apparently relied upon by defendants. Plaintiffs do not now assert a right to an administrative hearing or a *de novo* trial on the claim originating abroad.

It is defendants' position that the waiver of sovereign immunity effected by the Federal Tort Claims Act marks the limit of the plaintiffs' rights, and that the statute and the regulations promulgated pursuant to it vest in the defendants authority to prescribe the procedure for acting on claims of foreign origins. Defendants claim

that "[t]he same statute and regulations that create a right to recover from the Government on tort claims provide the exclusive source of the procedures which govern the investigation and consideration of those claims at the administrative level." Defendants' Reply to Plaintiff's Opposition to Motion to Dismiss or for Partial Summary Judgment at 4. However, Judge Mazzone observed in *Gerritson v. Vance*, 488 F. Supp. 267 (D. Mass. 1980):

> While it is true that there is no common law right 'to be free [from] injury whenever the State may be characterized as the tortfeasor,' . . . the administrative provisions created by Congress established at least a right to bring claims of foreign origination. Once that right is established, it cannot be dealt with arbitrarily.

Id. at 269.

A decision that a claimant in the position of plaintiffs is not entitled to a "trial type" hearing does not dispose of the question of whether a foreign originating claimant in the position of plaintiffs is entitled to a list of the witnesses relied upon by the defendants (particularly expert witnesses) and a copy of any documentary evidence relied upon by the defendants including summaries of the expert testimony available to the defendants.

Defendants make the point that plaintiffs have not properly invoked the jurisdiction of this court, *e.g.* 28 U.S.C. § 1331, and that the Administrative Procedure Act does not itself provide an independent basis of federal court jurisdiction. This narrow point may be well taken. Accordingly, an accompanying order will grant plaintiffs leave to amend their complaint, whereupon the motion to dismiss Count IV will be denied. The Court will entertain a suggestion to certify the apparently original question here resolved.

Defendants also move to dismiss Counts II and III. This aspect of defendants' motion is well taken. To the extent that Count II reiterates the Count I allegation that the State Department negligently failed to advise plaintiff of her option to have her baby delivered in the United States, Count II is redundant. To the extent that Count II relates to the failure of personnel in Liberia to advise plaintiff of her option, it must be dismissed, along with Count III, because they both charge tortious conduct outside the United States.

An accompanying order will schedule a status call to arrange for administration of the remaining aspects of the case.

Date: October 25, 1988

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0270-LFO

LINDA WHEELER TARPEH-DOE, *et al.*,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants.

MEMORANDUM

[Filed Dec. 22, 1988]

Defendants seek reconsideration of the Memorandum and Order filed October 25, 1988, denying their motion to dismiss Count IV of the Complaint. Plaintiffs long ago conceded, as they must, that tort claims against the United States arising from actions abroad may not be prosecuted *de novo* under the Federal Tort Claims Act.

The issue raised by Count IV of plaintiff's complaint relates to the administrative processing of those claims. The declaration of H. Rowan Gaither reveals that the same officials processed the domestic origin claim and the out-of-country claims on the erroneous assumption that they were both headed for *de novo* litigation. The fact is; of course, as reflected in the October 25, 1988 Memorandum, that plaintiffs may maintain a *de novo* action only with respect to the in-country claims. The adminis-

trative decision on the foreign origin claim is supposed to be an adjudication. That adjudication is not judicially reviewable on the merits. But plaintiffs are entitled to an adjudication as distinguished from the action of claims agents anticipating a *de novo* trial. It requires no authority beyond the plain language of the due process clause to know that in an adjudication the parties are entitled to know and have an opportunity to address the evidence to be used by the adjudicator in making his decision.

Accordingly, the motion for reconsideration is denied. Plaintiffs may wish to file a motion for partial summary judgment with a view to a direction to defendants to proceed to reconsider plaintiffs' foreign claim after disclosing the evidence to be relied on in that adjudication and affording them an adequate opportunity to comment on and counter that evidence.

An accompanying order will schedule a status call to arrange for further administration of this case.

Date: Dec. 21, 1988

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX E

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

October 9, 1987

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

John Jude O'Donnell, Esq.
Thompson, Larson, McGrail
O'Donnell & Harding
800 American Security Bldg.
730 Fifteenth St., N.W.
Washington, DC 20005

Dear Mr. O'Donnell:

This letter is to inform you of the Department's decision in the claim of Linda Wheeler Tarpeh-Doe individually and as mother and next friend of Nyenpan Tarpeh-Doe II under the Federal Tort Claims Act, 28 U.S.C. § 2672 *et seq.*, 22 C.F.R. 31 ("FTCA"). This claim was outlined in your letter dated February 1, 1984, addressed to AID General Counsel Howard Fry, and augmented by your letters dated July 25, 1985, and November 19, 1985.

The Act of August 1, 1956, extends the tort claim authority of the Secretary of State to claims arising in foreign countries in connection with the Department of State operations abroad. 22 U.S.C. § 2669(f).

The Department's investigation into the claim has been time-consuming due to the number of witnesses involved and the complicated nature of the substance of the claim. Every effort has been made to look thoroughly into every allegation made in the claim. Nevertheless, certain evidentiary gaps remain due to a lack of records. These records should have been supplied by the claimant, but

realizing the difficulty in obtaining records outside of the United States, efforts were made by the Department through the U.S. Embassy in Monrovia to obtain them, in some cases, regrettably, to no avail. It must be stressed, however, that under the FTCA, the claimant has the burden of proof, and the absence of competent evidence must be construed against the claimant.

The Department considered the claimant's allegations of fact and law in light of the documents submitted by the claimant and in light of the facts and law as ascertained in the Department's own investigation. The Department has concluded that compensable negligence under the applicable legal standards has not been demonstrated. The claim is therefore denied.

The FTCA provides for suit against the United States in the appropriate United States District Court in the event that the claimant does not concur with the denial. Such suit must be filed not later than six months after the date the denial is mailed. 28 U.S.C. § 2401, 22 C.F.R. 31.14. However, it is the Department's position that, under 28 U.S.C. § 2680(k), and 22 C.F.R. 31.18, the court would lack jurisdiction over any lawsuit arising out of any portion of your claim that arises in a foreign country, since any acts or omissions of the Department that might give rise to liability occurring in a foreign country are specifically excluded.

Sincerely,

/s/ Ronald Bettauer
RONALD J. BETTAUER
Assistant Legal Adviser for
International Claims and
Investment Disputes

APPENDIX F

STATUTORY GROUNDS INVOLVED

28 U.S.C. § 1346(b)

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Act of August 1, 1956

22 U.S.C. § 2669(f)

The Secretary of State may use funds appropriated or otherwise available to the Secretary to—

> (f) pay tort claims, in the manner authorized in the first paragraph of section 2672, as amended, of title 28, when such claims arise in foreign countries in connection with Department of State operations abroad.

The Federal Tort Claims Act

28 U.S.C. § 2672

The head of each Federal agency or his designee, in accordance with regulations described by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while

acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all offices of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2674

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual

under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. § 2675(a)

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

28 U.S.C. § 2680(k)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(k) Any claim arising in a foreign country.

APPENDIX G

REGULATIONS INVOLVED

22 C.F.R. Part 31

§ 31.1 Purpose.

The purpose of this part is to establish and provide a procedure for the preparation and submission of claims for personal injury, death, and property loss or damage capable of administrative settlement under the Federal Tort Claims Act (28 U.S.C. 2672), as amended and the act of August 1, 1956 (5 U.S.C. 170g), and claims for property loss or damage cognizable under the act of June 19, 1939 (22 U.S.C. 277e), and to authorize certain officers of the Department of State and of the U.S. Section, International Boundary and Water Commission, United States and Mexico, to consider, ascertain, adjust, determine, and settle such claims.

§ 31.2 Delegation of authority.

The Legal Adviser, the Deputy Legal Advisers and the Assistant Legal Adviser are authorized to consider, ascertain, adjust, determine, compromise, and settle claims capable of administrative settlement under the Federal Tort Claims Act and the act of August 1, 1956, except claims arising out of activities of the Commission and except that the Assistant Legal Adviser may only award, compromise or settle claims in the amount of $2,500 or less. Awards in excess of $25,000 require approval by the Attorney General or his designee. Chief's of mission and principal officers of fiscal reporting posts are authorized to consider, ascertain, adjust, determine and settle claims in an amount of $1,000 or less which are capable of administrative settlement under the act of August 1, 1956, arising out of the activities of their respective establishments. The Commissioner is authorized to consider, ascertain, adjust, determine, and settle claims cognizable under the Federal Tort Claims Act and

the act of June 19, 1939, arising out of activities of the Commission.

§ 31.4 Action by claimant.

(a) *Claimant.* Claims for property loss or damage may be filed by the owner of the property, his or her duly authorized agent or legal representative, or survivors. A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective interests appear, or jointly. Claims for personal injury may be filed by the injured person, his or her duly authorized agent or legal representative. Claims for death may be filed by the executor or administrator of the decedent's estate, or by any other person legally or beneficially entitled to assert such a claim in accordance with applicable local law governing the rights of survivors. When filed by an agent or legal representative, the claim must be presented in the name of the real claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing and be accompanied by evidence of his or her authority to present a claim on behalf of the claimant as agent, legal representative, executor, administrator, parent, guardian, or other legal representative.

(b) *Form of claim.* Claims arising in the United States and in the Territories and possessions of the United States should be prepared, in duplicate, on the standard form, "Claim for Damage or Injury," promulgated by the Bureau of the Budget. Copies of this form will be furnished upon a request to the Department or the Commission, as the case may be. All information requested therein should be given in detail. It is especially important that the amount claimed for property damage and for personal injury be indicated in the spaces provided. Claims arising in foreign countries should be

prepared in form of a sworn statement and submitted in duplicate. The original copy of the claim should be sworn to or affirmed before an official with authority to administer oaths or affirmations and should contain the following information, at least: (1) The name and address of the claimant; (2) the amount claimed for injury or death and for property loss or damage; (3) if property was lost or damaged, the amount paid or payable by the insurer and the name of the insurer; (4) the facts and circumstances in detail giving rise to the claim including the date, place and time of the accident or incident; (5) if property was involved, a description of the same and of the nature and extent of the damage and of the cost of repair or replacement; (6) if personal injury was involved, the nature of the injury, the cost of medical services and time and income lost from incapacitation; (7) if death is involved, the names and ages of the claimants and their relationship to the decedent; (8) the name of the employee of the United States who is alleged to be responsible for the accident or incident and the name and address of the Foreign Service establishment by whom he or she is or was employed; (9) the names and addresses of any witnesses to the accident or incident; and (10) if desired, the law applicable to the claim.

(c) *Place of filing claim.* Claims should be submitted directly to the office, bureau, division, or Foreign Service establishment of the Department, or of the Commission, out of whose activities the accident or incident occurred, if known; or, if not known, to the Assistant Legal Adviser for International Claims and Investment Disputes, L/CID, Department of State, Washington, D.C. 20520.

(d) *Evidence and information to be submitted by claimant*--(1) *General.* The amount claimed on account of damage to or loss of property or on account of personal injury or death should, so far as possible, be substantiated by competent evidence. Supporting statements, estimates

and the like should, if possible, be obtained from disinterested parties. All evidence should be submitted in duplicate. Original evidence or certified copies should be attached to the original copy of the claim and simple copies should be attached to the other copy of the claim. All documents in other than the English language should be accompanied by English translations.

(3) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant should submit the following evidence or information to the extent necessary to establish the elements of the claim.

(i) A written report by his or her attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the Departmhent or another Federal agency. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that he or she has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the Department any other physicians' reports previously thereafter made of the physical or mental condition which is the subject matter of his or her claim.

(ii) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(iii) If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment.

(iv) If a claim is made for loss of time from employment, a written statement from his or her employer showing actual time lost from employment, whether he or she

is a full or part-time employee, and wages or salary actually lost.

(v) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amount of earnings actually lost.

(vi) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

§ 31.6 Investigation of claims.

(a) When a claim is received, the office, bureau, division, or Foreign Service establishment out of whose activities the claim arose shall make such investigation as may be necessary or appropriate for a determination of the validity of the claim and thereafter shall forward the claim, together with all pertinent material, and a recommendation, based on the merits of the case, with regard to allowance or disallowance of the claim, to the Assistant Legal Adviser, Commissioner, chief of mission or principal officer of fiscal reporting post, as the case may be.

(b) Pursuant to instructions from the Department, acting at the request of any other Federal agency, a Foreign Service establishment shall make such investigations as may be necessary or appropriate for the determination of the validity of the claim arising outside of the United States, and thereafter shall forward the claim, together with all pertinent material, and a recommendation regarding allowance or disallowance of the claim, to the Department for transmission to the requesting agency.

§ 31.7 Determination of claims.

Claims will be determined in accordance with the applicable statute and the applicable subpart of this part.

§ 31.8 Adjustment or settlement of claims.

(a) Except on instructions from the Legal Adviser, Deputy Legal Advisers or the Assistant Legal Adviser no

claim will be adjusted or settled by a chief of mission, principal officer of a fiscal reporting post if it falls within one of the following categories:

(1) A new precedent or new point of law;

(2) A claim which involves or may involve a question of policy;

(3) A claim in which the United States is or may be entitled to indemnity or contribution from a third party and the claim against the third party has not been settled;

(4) A claim whose adjustment or settlement would, for any reason, control the disposition in a related claim in which the amount to be paid may exceed $25,000;

(5) A claim in which the United States, an employee, agent or cost-plus contractor is involved in litigation based on a claim arising out of the same transaction;

(b) If a chief of mission or principal officer of a fiscal reporting post considers, after the investigation of the claim has been completed, that the claim falls within one of the categories listed in paragraph (a) of this section, he or she shall transmit the claim, together with all pertinent material, to the Assistant Legal Adviser.

(c) When the Legal Adviser, Deputy Legal Adviser, or the Assistant Legal Adviser considers that a claim falls within one of the categories listed in paragraph (a) of this section, he or she shall consult the Department of Justice. Such consultation shall be initiated by a written communication addressed to the Assistant Attorney General, Civil Division, containing (1) a short and concise statement of the facts and of the reasons for the referral, (2) copies of relevant portions of the claim file, and (3) a statement of the recommendations and views of the Department.

(d) The settlement of a claim for an amount in excess of $25,000 shall not be effected until the Legal Adviser,

Deputy Legal Adviser, or the Assistant Legal Adviser has obtained the written approval of the Department of Justice. Consultations with a view to obtaining such approval shall be initiated as provided in paragraph (c) of this section. For purposes of this paragraph, a principal claim and a derivative or subrogated claim shall be treated as a single claim.

§ 31.9 Payment of claims.

(a) When a claim is approved:

(1) If payment is to be in the amount of $2,500 or less it will be made out of appropriations available to the Department;

(2) If payment is to be in excess of $2,500 and not more than $100,000 it will be obtained by the Department by forwarding Standard Form 1145 to the Claims Division, General Accounting Office.

(3) If payment is to be in excess of $100,000 by the Department by forwarding Standard Form 1145 to the Bureau of Accounts, Department of the Treasury, which will be responsible for transmitting the award, compromise, or settlement to the Bureau of the Budget for inclusion in a deficiency appropriation bill.

(b) When the use of Standard Form 1145 is required it shall be executed by the claimant or it shall be accompanied by either a claim settlement agreement or Standard Form 95 executed by the claimant.

(c) If payment is to be in excess of $25,000, Standard Form 1145 shall be accompanied by evidence that the award has been approved by the Attorney General or his or her designee.

(d) When the claimant is represented by an attorney, the voucher for payment shall designate both the claimant and his or her attorney as "payee," and the address of

the attorney shall be indicated on the voucher. The check shall be delivered to the attorney.

§ 31.10 Final denial of claim.

Final denial of an administrative claim shall be in writing and sent to the claimant, his or her attorney, or legal representative by certified or registered mail. Except in the case of claims arising in foreign countries, the notification of final denial shall contain a statement that if the claimant is dissatisfied with the decision, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of the notification.

§ 31.18 General.

The act of August 1, 1956 (5 U.S.C. 170g) authorizes the Secretary of State, when funds are appropriated therefor, to pay tort claims in the manner authorized in the first paragraph of 28 U.S.C. 2672, as amended, when such claims arise in foreign countries in connection with Department of State operations abroad. Consequently, the Federal Tort Claims Act and Subpart B of this part are applicable to claims filed under the act of August 1, 1956, except that no provision has been made in that act for the institution of suit if a claim is denied.

APPENDIX H

UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

[SEAL]

The Honorable
Bob Dole,
United States Senate.

Dear Senator Dole:

In view of your expressed interest, I am writing to you about the claim of Mr. *Jay Lawrence Pinney* against the Department for alleged medical malpractice.

According to available information, Mr. Jay Lawrence Pinney injured his left leg and hip in 1979 in Jakarta, Indonesia, which became infected. He was treated by the Embassy medical personnel. Mr. Pinney was evacuated and referred to orthopedists in Singapore for further treatment. Still later Mr. Pinney departed for Kansas City, Kansas, where he entered the University of Kansas Medical Center.

On October 14, 1981, the attorney for Mr. Pinney filed an administrative tort claim against the Department for damages in the amount of $2 million under the Federal Tort Claims Act, alleging malpractice.

The Department regrets Mr. Pinney's medical condition and the attendant sequelae. After careful and sympathetic consideration, we concluded that the actions of the Department's medical personnel fully met the standard of adequate care and were in no way negligent. Based upon all available evidence and documentation, Mr. Pinney failed to establish that the Department of State and its medical personnel were negligent and that such negligence was the proximate cause of his disabilities.

The Department is acutely aware of its responsibility to adjudicate medical negligence claims fairly and objectively. Mr. Pinney's physicians submitted comprehensive opinions which were carefully reviewed by Department medical officers, as well as by other expert consultants. Utmost attention was given to all the evidence, particularly the experts' opinions. Every fact of the case was carefully investigated. Mr. Pinney instituted suit in the United States District Court for the District of Columbia on March 10, 1982, which was dismissed on July 26, 1982, on the stipulation of the parties that it be without prejudice and be remanded to the Secretary of State for further consideration. The claim was, in fact, given four formal reviews over a period of two years. The final review, completed on March 21, 1983, affirmed the Department's denial of the claim. Notification was sent to Mr. Pinney's attorney on April 27, 1983. A copy of the Department's letter is enclosed for convenient reference.

Mr. Pinney has again instituted proceedings for the second time on or about September 20, 1983, again alleging negligence on the part of the Department's medical personnel in Jakarta, Singapore and the United States, and violation of due process because there is lacking a formal-type adjudicatory hearing on the administrative level.

When the Congress made a limited waiver of the sovereign immunity of the United States in enacting the Federal Tort Claims Act, the statute accorded the claimant a fair hearing. The statute expressly excluded claims arising in a foreign country.

If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

ALVIN PAUL DRISCHLER
Acting Assistant Secretary
Legislative and
Intergovernmental Affairs

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5210

LINDA WHEELER TARPEH-DOE, individually
and as mother and next friend of
NYENPAN TARPEH-DOE, II, *et al.*

v.

UNITED STATES OF AMERICA,
Appellants

Before: Wald, Chief Judge; Mikva and Buckley, Circuit Judges

ORDER

[Filed Aug. 13, 1990]

Upon consideration of appellees' petition for rehearing, filed July 23, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald would grant the Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5210

LINDA WHEELER TARPEH-DOE, individually
and as mother and next friend of
NYENPAN TARPEH-DOE, II, *et al.*

v.

UNITED STATES OF AMERICA,
Appellants

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

[Filed Aug. 13, 1990]

Appellees' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Henderson did not participate in this matter.

(3)

No. 90-745

Supreme Court, U.S.
FILED
JAN 16 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

LINDA WHEELER TARPEH-DOE,
INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND
OF NYENPAN TARPEH-DOE, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Secretary of State's discretionary authority to pay foreign tort claims in connection with Department of State operations abroad creates a property interest to which the Due Process Clause applies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes, and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-745

LINDA WHEELER TARPEH-DOE,
INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND
OF NYENPAN TARPEH-DOE, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-16a, is reported at 904 F.2d 719. The opinion of the district court, Pet. App. 17a-25a, is reported at 712 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1990. A petition for rehearing was denied on August 13, 1990. Pet. App. 46a. The petition for a writ of certiorari was filed on November 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Linda Wheeler Tarpeh-Doe gave birth in Liberia to a baby who contracted infections leading to permanent brain damage. Petitioners filed an administrative tort claim in which they alleged that the negligence of State Department employees caused the baby's injury. The State Department's investigation of petitioners' claim determined that the baby's injuries were not the fault of any government employee, and the Secretary of State's designee denied the claim. Petitioners filed suit charging that the administrative claims process followed in their case violated the Due Process Clause of the Fifth Amendment. The district court agreed and on that premise ordered the disclosure of certain information and reconsideration of petitioners' claim. On appeal, the court of appeals reversed on the ground that no statute or regulation gave petitioners a property interest protected by the Due Process Clause.

1. According to the second amended complaint, petitioner Linda Wheeler Tarpeh-Doe was an International Development Intern with the Agency for International Development. In 1981, she was assigned to the American Embassy in Monrovia, Liberia. On May 18, 1982, she gave birth to Nyenpan Tarpeh-Doe II. Less than three weeks later, the baby became very ill, and an embassy physician ordered the baby evacuated immediately to the United States. The evacuation order was countermanded later that day, however, after the embassy physician had the baby examined by an American missionary doctor who was in charge of the pediatric ward at John F. Kennedy Hospital in Monrovia The pediatrician ordered the child transfered to Kennedy Hospital because he believed he could treat the baby. Mrs. Tarpeh-Doe

and her husband objected to the transfer and demanded that their baby be evacuated as originally planned, but the embassy physician agreed with the pediatrician and declined to order the evacuation. On June 17, 1982—after 12 days during which the baby's condition showed no improvement—the baby was evacuated to the United States. The child, who is blind and has suffered permanent brain damage, is currently institutionalized in Denver. C.A. App. 13-19.

2. In 1984, petitioners filed an administrative tort claim with the Department of State alleging negligence by the Department and its employees. C.A. App. 23. The claim invoked the first paragraph of 28 U.S.C. 2672 of the Federal Tort Claims Act (FTCA). That paragraph authorizes the head of each federal agency to consider any claim for money damages against the United States arising from the negligence of any agency employee while acting in the scope of his employment. Although the FTCA itself does not apply to "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), the Act of August 1, 1956, ch. 841, § 2(f), 70 Stat. 890, provides:

> [T]he Secretary of State may use funds appropriated or otherwise available to the Secretary to—
>
> * * * * *
>
> (f) pay tort claims, in the manner authorized in the first paragraph of section 2672, as amended, of title 28, when such claims arise in foreign countries in connection with Department of State operations abroad.

22 U.S.C. 2669(f).

Regulations promulgated under the Act of August 1, 1956, establish the procedures by which the

Secretary of State will exercise his discretionary authority to pay foreign tort claims. See 22 C.F.R. Pt. 31. Section 31.6(a) states that the "Foreign Service establishment" out of whose activities the claim arose "shall make such investigations as may be necessary or appropriate" and "thereafter shall forward the claim, together with all pertinent material, and a recommendation, based on the merits of the case, with regard to allowance or disallowance of the claim." Section 31.7 states that "[c]laims will be determined in accord with the applicable statute and the applicable subpart of this part." The applicable statute (the Act of August 1, 1956) requires that the claim satisfy the first paragraph of 28 U.S.C. 2672. See 22 U.S.C. 2669(f). The applicable subparts of 22 C.F.R. Pt. 31 make further provision with respect to adjustment or settlement of claims, 22 C.F.R. 31.8, payment of claims, 22 C.F.R. 31.9, and denial of claims, 22 C.F.R. 31.10,[1] but do not require the payment of foreign tort claims merely because payment is consistent with the governing statute.

3. Upon receiving petitioners' claim, a claims attorney in the State Department began an investigation. The attorney conducted interviews with persons familiar with the case, consulted outside ex-

---

[1] 22 C.F.R. 31.10 provides in full as follows:

> Final denial of an administrative claim shall be in writing and sent to the claimant, his or her attorney, or legal representative by certified or registered mail. Except in the case of claims arising in foreign countries, the notification of final denial shall contain a statement that if the claimant is dissatisfied with the decision, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of the notification.

perts, reviewed relevant documents, and met with petitioners' counsel. Pet. App. 3a.

In a detailed memorandum, App., *infra*, 1a-25a, the claims attorney concluded that "most or all" of the baby's neurological damage was caused by an "infection [that] had already occurred when the child was brought in to the Embassy health clinic, and that the treatment received was prompt and effective in eliminating the infection," *id.* at 21a.[2] The attorney found that the baby had been ill for at least

---

[2] We reproduce the claims attorney's memorandum because amici American Foreign Service Ass'n et al. claim that it constitutes an "impermissible secret law" and that it improperly applied Liberian law. Amici Br. 8-9. Amici also promise that these issues "will be more particularly described in Petitioner's Reply to the Opposition to Petition for Certiorari." *Id.* at 9.

Review of the claims attorney's memorandum reveals a careful and comprehensive investigation of petitioners' claim. Despite the sinister connotations of amici's reference to "secret law," the district court held only that the memorandum "would, *unless disclosed*, be impermissible 'secret law,' " *Tarpeh-Doe* v. *United States*, No. 88-0270-LFO (D.D.C. Nov. 13, 1990), slip op. 10 (emphasis added), because it constituted "the essence of the decision making process," *id.* at 7. The discovery dispute to which the district court decision refers—whether the memorandum is privileged or otherwise protected from disclosure—has absolutely no relevance to the question presented here and casts no doubt on the propriety of the State Department action in this case.

The choice of law question to which amici allude is likewise irrelevant to the proper disposition of this petition. But we note that insofar as the memorandum looked to Liberian law, it is consistent with the reference, in the first paragraph of 28 U.S.C. 2672, to "the law of the place where the act or omission occurred." Moreover, in view of the analysis and conclusions reached in the memorandum, it does not appear that the source of applicable law was of controlling significance.

three days before Mrs. Tarpeh-Doe brought him to the embassy clinic, and that the baby's infections had not received medical attention even though a government physician and nurse treated Mrs. Tarpeh-Doe at her home for post-natal infections during this period. *Id.* at 3a, 13a. When Mrs. Tarpeh-Doe and her husband finally brought the baby to the embassy clinic, his situation was grave: he had large lesions on his groin, buttocks, and legs and had suffered a seizure earlier that morning. *Id.* at 13a. The embassy physician, alone except for the presence of a clinical nurse, had to make a "clinical decision on the spot" and decided to administer antibiotics to counter the infection. *Id.* at 14a. On the basis of his interviews with medical professionals, the claims attorney determined that the physician's decision was correct. *Id.* at 14a-15a. The antibiotics that he administered did not mask a salmonella infection; the preexisting infection—not salmonella—caused the baby's injuries; and the antibiotics were effective against salmonella. *Ibid.*[3]

---

[3] Although petitioners alleged that the embassy physician was negligent in not evacuating the baby to the United States as originally planned, the claims attorney found that the embassy physician and pediatrician "together determined that the risk that the gravely ill child would not survive evacuation to the United States outweighed the advantages of the medical care available in the U.S." App., *infra*, 15a; see *id.* at 5a, 7a. Instead of evacuating the baby to the United States, the attending physicians placed him in Kennedy Hospital, where the pediatrician—"the best qualified and most experienced physician in Liberia for treating neonatal meningitis," *id.* at 25a—could closely supervise his care. Although the conditions of the hospital were "deplorable" by U.S. standards, the baby was moved to a more

Based on his findings that the damage had occurred before the baby was brought to the embassy clinic, and that the doctors rendered proper care under the circumstances, the claims attorney recommended that petitioners' claim be denied. App., *infra*, 25a. Before drafting his final recommendation, the claims attorney met with petitioners' counsel to discuss his investigation. C.A. App. 92. At the meeting, the claims attorney "addressed each element" of petitioners' claim and stated "the bases for [his] views thereon." *Ibid.* In particular, the claims attorney stated that "the principal theory of the claim [that the baby's injuries were caused by a salmonella infection] was not substantiated based on the documents submitted to the [State] Department on behalf of the claimant and confirmed by the experts with whom [the attorney] consulted." *Id.* at 92-93. In light of his discovery that the preexisting infection was responsible for the baby's injuries, the claims attorney noted the "serious problem of proximate cause created by the factual circumstances." *Id.* at 93. The claims attorney's recommendation was forwarded to the Assistant Legal Advisor for Inter-

---

distant hospital with "notably more sanitary" conditions the next morning. *Id.* at 5a-6a.

After 12 days of treatment, "the doctors determined that because of the baby's overall stable condition it would be safe to medevac him." App., *infra*, 7a. The doctors' concern about the stress of evacuation on the baby was borne out by the event. The evacuation took more than 22 hours and weakened the baby to the point where "[i]t was necessary to give mouth-to-mouth breathing." *Ibid.* Upon arrival in the United States, the baby was admitted to the University of Colorado hospital and released a little more than two weeks later. *Id.* at 8a. He is currently a full-time patient at a Colorado facility at state expense. *Ibid.*

national Claims and Investment Disputes, who issued a formal denial of petitioners' claim in a letter sent by certified mail.[4] Pet. App. 31a-32a. The letter did not repeat the bases for denying petitioners' claim. *Ibid.*

4. Petitioners filed suit against the United States and the Secretary of State under the FTCA. The district court granted partial summary judgment for petitioners.[5] The court held that the State Department's procedures for resolving foreign tort claims violate the Fifth Amendment's Due Process Clause because they fail to require disclosure of the evidence on which a claim has been denied. Pet. App. 23a-24a. The district court remanded the case to the State Department for reconsideration, and required the Department to:

> (1) disclose to plaintiffs the evidence relied upon in the original denial of their claim and to be relied upon in reconsideration of it, (2) afford plaintiffs an adequate opportunity to comment on and counter that evidence, and (3) make and provide to plaintiffs findings of fact that address the evidence relied upon by the decisionmaker in the original decision and the reconsideration of it, and any comment or counter submitted by

---

[4] Petitioners assert that the Assistant Legal Advisor was "not authorized" to act on petitioner's claim. Pet. 6 n.5. Petitioners do not present that issue for this Court's review, and in fact, the Assistant Legal Advisor had authority, on the basis of long-standing State Department practice, to deny administrative tort claims. That practice now appears at 22 C.F.R. 31.2 (codified Nov. 11, 1987).

[5] The balance of the case—which involves alleged negligent acts or omissions in the United States—has since been tried before the district judge. No judgment has been entered.

> plaintiffs in response to evidence disclosed to them.

Id. at 25a.

On appeal, the court of appeals reversed.[6] Pet. App. 1a-10a. It explained that this Court has required individuals asserting a constitutional right to certain procedures to demonstrate that they have been deprived of a protected liberty or property interest. *Id.* at 7a. Only interests that rest on a "legitimate entitlement" as opposed to "an abstract need or desire" are considered "protected interests." *Ibid.* (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). Whether a given statutory scheme gives rise to a protected interest depends on whether the statutes or regulations making up that "scheme" direct officials that if the "substantive predicates are present, a particular outcome must follow." Pet. App. 7a (quoting *Kentucky Dep't of Corrections* v. *Thompson*, 109 S. Ct. 1904, 1910 (1989)). Applying those principles, the court ruled that:

> [t]he plain language of § 2669(f) does not give a claimant the right to demand either payment of tort claims or procedures for the consideration of such claims.

Pet. App. 8a. The court of appeals also held that the regulations promulgated to implement the Act of August 1, 1956, entitled a claimant only to an investigation and to the decision maker's opportunity to review the claim and the results of the investiga-

---

[6] Petitioners moved to dismiss the appeal for lack of jurisdiction. By order issued November 9, 1989, the court of appeals denied the motion, ruling that the district court's decision was an appealable collateral order under *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

tion. *Ibid.* Thus, neither the statute nor the regulations "provide[d] a sufficient basis for the district court's conclusion that the administrative scheme for handling tort claims arising abroad implicates the due process clause." *Id.* at 9a.

Chief Judge Wald dissented. Pet. App. 11a-16a. She concluded that "the Regulations do explicitly and implicitly assume that an administrative claim, foreign or domestic, will be decided on the same legal and equitable principles that govern court determinations." *Id.* at 15a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Analysis of the question presented—whether petitioners have a liberty or property interest protected by the Fifth Amendment's Due Process Clause—requires identification of the interests they seek to protect. Petitioners claim that this case involves "denial of a claim for congressionally-authorized benefits." Pet. 14. Those "benefits" appear to be financial compensation "to Mrs. Tarpeh-Doe and her son to assist their recovery from injury," Pet. 15, and "a merit-based decision pursuant to the criteria set forth in the Department's regulations," Pet. 16.

a. Petitioners' understandable desire for financial compensation is not a property interest protected by the Due Process Clause. It is well settled that the Clause "is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property. In other words, where a government official is merely negligent in causing the injury, no

procedure for compensation is constitutionally required." *Davidson* v. *Cannon*, 474 U.S. 344, 347 (1986); see *Daniels* v. *Williams*, 474 U.S. 327, 333 (1986). Petitioners' complaint alleges at most negligent conduct by the embassy physician in rendering professional care. C.A. App. 19-30. The interest in compensation for injury negligently inflicted by government agents is not by itself sufficient to invoke the Due Process Clause.

b. Petitioners' claimed property interest in a "merit-based decision" is not supported by either the governing statute or applicable regulations, and is not protected by the Due Process Clause.

The Act of August 1, 1956, creates no entitlement to a merit-based decision because the language of the Act ("[t]he Secretary of State *may* use funds" (emphasis added)) is entirely discretionary. 22 U.S.C. 2669(f). As this Court held in *Olim* v. *Wakinekona*, 461 U.S. 238 (1983):

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.

Id. at 250. If no entitlement exists, as in this case where the decisionmakers' discretion is unfettered, due process protection does not attach. *Id.* at 250 n.10.

Nor is such an entitlement created by the Secretary of State's regulations. As explained at p. 4, *supra*, the regulations require only that the responsible foreign service establishment conduct an investigation and that the claim and results of the investigation be submitted to the ultimate decisionmaker for review. 22 C.F.R. 31.6(a). As the court of appeals

correctly observed, "this is where the chain necessary to [petitioners'] claim of entitlement ends":

> As noted, the Regulations nowhere provide that the decisionmaker must comply with the recommendation prepared by the officer investigating the claim's validity or, alternatively, that the decisionmaker must provide a statement of reasons for not following the investigator's recommendation. We cannot say, therefore, that the Secretary has erred in construing his own Regulations not to *require* the Department to pay claims *even* if the investigator determines that the claim is valid and recommends payment.

Pet. App. 8a-9a.

In her dissent, Chief Judge Wald relied entirely on what she regarded as a "crucial sentence" in 22 C.F.R. 31.18. Pet. App. 14a. That provision, which constitutes all of Subpart C of the regulations, reads in its entirety:

> The act of August 1, 1956 (5 U.S.C. 170g) authorizes the Secretary of State, when funds are appropriated therefor, to pay tort claims in the manner authorized in the first paragraph of 28 U.S.C. 2672, as amended, when such claims arise in foreign countries in connection with Department of State operations abroad. Consequently, the Federal Tort Claims Act and Subpart B of this part are applicable to claims filed under the act of August 1, 1956, except that no provision has been made in that act for the institution of suit if a claim is denied.

Judge Wald read into the second sentence of the provision a requirement that the Secretary "pay meritorious claims." Pet. App. 14a. But neither the sentence in itself nor the provision of which it is a

part can bear such an extraordinary weight. On the contrary, the provision simply echoes the congressional extension, to foreign tort claims, of the authorization in the first paragraph of 28 U.S.C. 2672, and the consequent extension to those claims of the administrative procedures of Subpart B of the Secretary's regulations.

2. Petitioners offer a variety of reasons for this Court's review. None of them has merit.

a. First, petitioners contend that the court of appeals' decision creates a "conflict with the majority of the circuits," Pet. 12, 14, which find property interests when "the state creates an entitlement to general assistance," Pet. 14 (citing *Gregory* v. *Town of Pittsfield*, 470 U.S. 1018, 1021-1022 (1985) (O'Connor, J., dissenting from denial of certiorari)). But whether or not those decisions are correct,[7] this is not an entitlement case. The governing statute and regulations, examined above, establish that petitioners have no entitlement to compensation for torts committed by government agents outside the United States.

b. Second, petitioners argue that the court of appeals' decision conflicts with this Court's decision in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). Pet. 17. In *Logan*, this Court reaffirmed the holding in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-315 (1950), that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." 455 U.S. at 428.

---

[7] Cf. *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.").

In *Logan* and *Mullane*, the claimant's "right to redress [wa]s guaranteed by the State, with the adequacy of his claim assessed under what [wa]s, in essence, a 'for cause' standard." 455 U.S. at 431; see *id.* at 430 ("The hallmark of property * * * is an individual entitlement * * * which cannot be removed except 'for cause.' "). In this case, by contrast, petitioners have no right to redress. Congress's authorization to pay foreign tort claims is merely permissive. Although the State Department's regulations require the observance of certain procedural steps, they do not establish a cause of action such as would create a property right protected by the Due Process Clause.

c. Third, petitioners claim that the decision below "encourages arbitrary treatment of claimants." Pet. 19. They find it "difficult to conceive of any rational reason why the Department should be free to deny meritorious claims." Pet. 27.

In fact, it appears that Congress's primary purpose in vesting the Secretary with discretion was to reduce the volume of private bills. As petitioners acknowledge in their chronology of the FTCA, Pet. 21, Congress retained sovereign immunity from foreign tort claims when it enacted the FTCA in 1946. For the next decade, Congress continued the practice of entertaining private bills to compensate the victims of tortious conduct committed by government agents abroad. Congress enacted the Act of August 1, 1956, to give the Secretary the authority, "in the event of an automobile accident or some other tort claims abroad," to settle those claims "without a great deal of red tape." H.R. Rep. No. 2508, 84th Cong., 2d Sess. 9 (1956). This description of the purpose of the 1956 Act suggests that it was primarily intended to transfer the discretionary compensation function

from Congress (which could act only by private bill) to the Secretary of State (who could establish an informal administrative process "without a great deal of red tape"). The process adopted by the State Department is entirely in keeping with that objective.

Of course, Congress could have reduced the volume of private bills simply by removing the FTCA exemption for foreign torts. That Congress instead authorized discretionary payments of foreign tort claims suggests an additional purpose: to give the Secretary of State flexibility in compensating claims for tortious conduct originating in the territory of another sovereign. As attested by the Assistant Legal Advisor, "[t]he discretionary structure of 22 U.S.C. § 2669(f) and its implementing regulations permits the Department to take foreign policy interests into account in the disposition of foreign tort claims." C.A. App. 97-98. The question whether to pay in a given case is affected by a variety of factors in the foreign policy context. These factors include whether intelligence or confidential activities are involved and whether a foreign government may take offense. Because the foreign policy interests of the United States might require denial of a claim in an appropriate case, Congress may well have found it important that the system for compensating foreign torts be informal as well as discretionary. A holding that Congress must provide a formal, adversary compensation system if it provides an administrative claims process at all might force it to return to the practice of entertaining private bills. Such a reversion would benefit neither claimants nor the Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys

JANUARY 1991

APPENDIX

[Seal]

United States Department of State
Washington, D.C. 20520

October 2, 1987

MEMORANDUM

TO: L/CID—Mr. Bettauer

FROM: L/CID—H. Rowan Gaither

SUBJECT: FTCA Claim of Linda Wheeler Tarpeh-Doe

I. Statement of Facts

On December 29, 1980, Linda Wheeler entered on duty with the Agency for International Development (AID). On that date she also began an orientation session, a portion of which was dedicated to maternity rights for those posted abroad. Miss Wheeler completed the course and is presumed to have attended the portion on maternity rights.

Miss Wheeler was assigned to Monrovia, Liberia, in May of 1981. Shortly after she arrived she met Nyenpan Tarpeh-Doe, a former Liberian police officer. They were married in December 1981. On May 18, 1982, a baby, Nyenpan Tarpeh-Doe II was born. The delivery was performed by a Liberian physician, C. Archibald Johnson, M.D., who specialized in Obstetrics and General Practice. Mrs. Tarpeh-Doe did not consult the health unit of the U.S. Embassy in Monrovia in connection with her pregnancy. Mrs. Tarpeh-Doe, however, had been advised on a personal

basis by the Embassy laboratory technician and other friends to have delivery of the baby outside of Liberia, but she decided to have the delivery in country.

After the baby's birth, probably during the second week, Mrs. Tarpeh-Doe developed severe bilateral mastitis (an infection in both her breasts) and temporarily stopped breast feeding the baby; in addition, she had an infected episiotomy (the incision made in her vulva to facilitate childbirth). She was given ampicillin by local health care providers for these infections. She was also receiving treatment for malaria. Cultures later taken from Mrs. Tarpeh-Doe's milk at the Embassy health clinic (on June 7) grew gram-positive staphylococcus bacteria.

The records show that on June 2, the baby developed a rash on his perineum (the pelvic region). On the evening of June 3, a U.S. Government doctor, Dr. Feir, and nurse, Billie Clement, R.N., visited Mrs. Tarpeh-Doe at her residence to examine her for her post-natal infections. Mr. Tarpeh-Doe, baby Nyenpan, and several other adults and children were also present. The residence was described as clean and neat. Mrs. Tarpeh-Doe's temperature was 104 degrees. Neither Mrs. Tarpeh-Doe nor Mr. Tarpeh-Doe mentioned the baby's condition, nor did they request that he be examined. Mr. Tarpeh-Doe was observed attempting to give the baby water. Mrs. Tarpeh-Doe was told to go to the Embassy clinic the next day.

Sometime that evening the baby began to show additional signs of illness. He stopped eating, and slept through the night. In the morning Mrs. Tarpeh-Doe went to the Embassy clinic for the requested follow-up examination, which was performed by Dr. Theodore Lefton, M.D., the physician in charge of the unit. She did not take the baby with her. That day

the baby stopped crying, developed a fever, and slept continuously. The parents took him to two local clinics that afternoon and evening, where he was given an electrolyte solution and oral ampicillin. That night he continued to be lethargic and have spiking fevers. He did not wet his diaper all night. He had not passed stool in six days. At 6.00 AM on June 5, a Saturday, the parents noticed a stiffening of the child, later diagnosed as a seizure. They decided to take the baby to Dr. Johnson that morning, and ran into the Embassy nurse, Billie Clement on her way home from the Embassy clinic at 10:29 AM. They were very upset and asked if she could help them, that they didn't know what was wrong with their baby. Nurse Clement could see that the baby was very ill, and she advised the parents to go to the Embassy clinic. They agreed, and she accompanied them there. Nurse Clement then called Dr. Lefton from the clinic.

Dr. Lefton arrived at the health unit at 10:30 AM. This was the first time he had seen the child. He saw immediately that the baby was gravely ill, and determined that the child required more treatment than the clinic could provide. Accordingly, he sent the medical technologist, Mary Awantang, out to locate Dr. David Van Reken, an American missionary physician in charge of the pediatric ward at John F. Kennedy hospital in Monrovia, and to bring him back to examine the baby. Because telephones in the city were not working, however, Dr. Lefton could not be sure until Ms. Awantang returned whether Dr. Van Reken would be available.

Dr. Lefton examined the baby, noted pustular lesions and blisters over the entire buttocks, scrotum and penis, and extending down the legs and up to the umbilicus, noted a rectal temperature of 101.8 de-

grees, and made a diagnosis of sepsis and probably meningitis. Dr. Lefton made a qualified statement to the parents, noted in the medical record, that if he could not contact Dr. Van Reken to treat the baby he would have the baby airlifted to a hospital in the United States by medevac that evening. He administered procaine penicillin 150,000 units I.M. and 8 milligrams of Gentamicin I.M. The baby subsequently had a seizure, and Dr. Lefton administered 15 mg. phenobarbitol I.M. at 10:50 AM.

Dr. Van Reken arrived at 11:30 AM. The baby's rectal temperature was 102.2 degrees and he had had several seizures since being brought to the Embassy clinic. Dr. Van Reken administered 3 mg. valium I.M. to control the seizures. Dr. Lefton, Dr. Van Reken, and Nurse Clement then discussed the continued feasibility of a medevac and agreed that the child was now too critical to survive a medevac. A spinal tap was done with the assistance of Ms. Awantang, and a heel prick was done to obtain a blood test sample. The spinal tap produced a clear spinal fluid, and a gram stain showed rare gram-positive cocci. Cultures, however, showed no growth at 24, 36, or 48 hours. A gram stain of a skin pustule was obtained, and small gram-positive cocci were found. A culture was also taken and it produced a heavy growth of gram-positive cocci, subsequently shown to be *staphylococcus aureas.* These bacteria were shown to be resistant to penicillin and ampicillin, and sensitive to methicillin, erythroycin, and chloramphenocol. They were the same bacteria grown earlier from cultures of the mother's breast milk. The baby pased a stool, and cultures, including a salmonella-shigella agar culture, were done. These cultures showed growths of *staphylococcus aureas* identical to those cultured from the skin pustules and

from the mother's breast milk. No salmonella bacteria were grown. Malaria tests from the blood sample were negative.

Dr. Van Reken then recommended that the baby be admitted to John F. Kennedy Medical Center in Monrovia where he could be under his care. Dr. Van Reken worked at this hospital and was of the view that if the child were there he could more closely observe him. The alternative, the ELWA Hospital, was across town. The parents objected because of the hospital's reputation for uncleanliness, and requested that the baby be evacuated by airlift to the U.S. Dr. Van Reken and Dr. Lefton refused to give permission to evacuate the baby, however, based on their determination that the baby could not be safely airlifted until his condition stabilized. Apparently, the basis of the doctors' decision was either not clearly communicated or not clearly understood by Mrs. Tarpeh-Doe.

Dr. Lefton agreed that the baby should go to JFK hospital and be under Dr. Van Reken's care, and the baby was taken by ambulance to the JFK hospital despite the parents' protests, where a course of treatment including I.V. penicillin, chloramphenacol, and phenobarbitol was begun. The baby continued to record rectal temperatures to 102-103 degrees, and had seizures lasting 20-30 seconds every hour throughout the night.

The conditions of the hospital were deplorable by U.S. standards. That night Mrs. Tarpeh-Doe, who was herself still ill, saw cockroaches in the baby's isolette, some even crawling over the baby's skin (which had open lesions), and saw rats present in the room. The parents insisted that the baby be moved the next morning. A room in the ELWA hospital, Monrovia, was found, and he was taken there

by ambulance. Dr. Van Reken continued to manage the baby, along with the help of Dr. Lefton and the physicians at ELWA. The conditions at ELWA were notably more sanitary than at JFK.

The previous day, Saturday, a friend of Mrs. Tarpeh-Doe had contacted her mother in Colorado, who subsequently notified the Department in Washington that she had made arrangements for the child to be received at the University of Colorado Hospital when it would be evacuated.

The baby's seizures ceased on June 6, the first day in ELWA hospital, and he began to sleep. On June 8, the baby became afebrile, and on occasion became hypothermic, whereupon his temperature was stabilized in a warm isolette with blankets. On June 9 his temperature rose again several times to 101.4 degrees. A spinal tap was performed, which produced clear spinal fluid, and blood was drawn. Gram stains and acid-fast stains of both blood and fluid showed no bacteria. All the cultures done on June 5 were repeated, and showed no growth of bacteria. Samples were also sent by diplomatic pouch to Washington for a counter-immuno-electrophoresis test, but an error was made in the instructions by the Department to the laboratory and this test was never done. Results of the test actually done, an immuno-electrophoresis test, were never sent to the Embassy in Liberia for use by Dr. Van Reken.

From June 10 the baby's fever subsided, and he remained afebrile through June 15. The phenobarbitol was also discontinued, and during the period from June 10 through June 15 he became progressively more awake and alert, each day doing something he could not do the day before: spontaneous arm movements, swallowing saliva, blinking eyes to noises, opening eyes when stimulated, opening eyes

spontaneously, yawning, stretching, sucking and crying. Periodically the baby's scalp would accumulate I.V. fluid, and on June 13 antibiotics were begun by N.G. tube (through the nose). Feeding had been by N.G. tube since June 10. On June 15, the 11th day hospitalized, the baby began sucking electrolyte solution from a bottle. But that night his temperature went up to 103 degrees and he had a seizure, for which phenobarbitol was recommended. The baby's head circumference did not increase. On June 16, the baby's highest rectal temperature was 102 degrees and the doctors determined that because of the baby's overall stable condition it would be safe to medevac him the next evening.

The parents had several times over the previous twelve days demanded evacuation to the United States, but Dr. Van Reken, together with Dr. Lefton and the nursing staff determined it was not safe to transport the baby until his condition was stable.

The baby was flown with his parents and Nurse Clement to the University of Colorado Hospital. The flight was very long and difficult, and the entire trip lasted more than 22 hours. On board, Nurse Clement had care of the baby, including feeding and administration of antibiotics and other drugs. At the beginning of the flight the baby was afebrile, and she gave it formula by bottle. At some point his temperature rose to 101.4, but there was no seizure. Tylenol was given to reduce the temperature. The baby became progressively weaker, the sucking tiring him out. Nurse Clement then switched to feeding the baby by N.G. tube. His temperature rose again, and was reduced by Tylenol. The baby became progressively more lethargic and had periods of apnea (cessation of breathing). It was necessary to give mouth-to-mouth breathing.

The baby was admitted to the University of Colorado Hospital with a temperature of 37.6 degrees Celsius (99.7 degrees Fahrenheit). A spinal tap and blood sample were taken, and tests and cultures done. One blood culture grew salmonella type B bacteria, resistant to ampicillin, chloramphenicol, bactrim and keflex. No other bacteria were grown. The baby was given moxalactam and gentamicin, and by the second day was afebrile. However, he had several episodes of wide swings in temperature from hypo- to hyper-thermic. These were controlled by blankets and baths.

The baby was discharged on July 3, 1982, into the care of his parents. The University of Colorado Hospital discharge statement listed the hospital's diagnosis of the baby's condition upon admission as follows:

1) Salmonella sepsis
2) Status post gram-positive cocci meningitis
3) Severe neurological deficit secondary to #2
4) Monilial thrush infection

The discharge summary also stated that "[b]oth EEG and CT [exams] were consistent with a severe neurologic deficit which was a sequella from the prior meningitis."

The baby is blind and has severe brain damage. The baby has little hope of substantial development and will probably be hospitalized for the remainder of his life. His future is grim and his life span is shortened. At present the child has been adopted by his grandmother, Mrs. Tarpeh-Doe's mother, and is a full time patient at the Wheat Ridge Regional Center, a Colorado State facility, at state expense.

II. LIABILITY

A. Negligence

Claimant alleges that her child was entitled to the "best possible medical care" from Dr. Lefton at the Embassy health clinic in Monrovia, and states that an internal Department regulation establishes this level of care. Claimant alleges that certain acts and omissions of Doctors Lefton and Van Reken in Liberia and of Department employees in the United States fell below this standard of care and constitute negligence. Claimant alleges that it was negligent: (1) for Dr. Lefton to give the child antibiotics before obtaining cultures of the child's blood and spinal fluid; (2) for Dr. Lefton to fail to evacuate the child immediately upon diagnosing sepsis and meningitis but instead to permit the child to be admitted to a deplorably unsanitary hospital; (3) for Department of State employees in the United States to fail to ensure that the evacuation was immediately carried out by Dr. Lefton; (4) for Department of State employees in the United States to fail to perform the correct laboratory tests on fluid samples sent from Liberia for analysis, and to fail promptly to inform Dr. Lefton of the results of the tests actually carried out; (5) for Dr. Lefton and Dr. Van Reken to fail to diagnose and treat the alleged true cause of the child's sepsis and meningitis—salmonella bacteria; (6) for Dr. Lefton and Dr. Van Reken to fail to use the chocolate agar culture medium to detect bacteria present; (7) for the Department to fail properly to hire, train and supervise Dr. Lefton; and (8) for the Department and Dr. Lefton and Dr. Van Reken to fail to consult a neonatologist contacted by the child's grandmother in Colorado.

1. *Applicable standard of care.*

The Foreign Affairs Manual of the Department of State states as follows:

> The general medical policy of the Department of State is to assist all American employees and their dependents in obtaining the best possible medical care. This includes personnel of the Department and all agencies participating in the medical program by agreement. This policy extends to the most remote parts of the world, so that no employee need hesitate to accept an assignment to a post where health conditions are hazardous, medical service poor, or transportation facilities limited. Principal and administrative officers and their designees, and principal representatives of participating agencies are cautioned to be alert to any medical and health problems of employees and their dependents and to take appropriate action promptly. 3 Foreign Affairs Manual 681.2

Claimant asserts that this directive obligates the Department to provide literally the "best possible" medical care to its employees. Federal safety and procedure manuals, however, do not create an actionable duty on which tort liability may be based. *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1144 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978). They are only internal operational guidelines. FTCA liability will attach only if the law of the place in which the act occurred would impose liability for the same conduct required in the manual. *Le Seur* v. *United States*, 617 F.2d 1197, 1200 (5th Cir. 1980). Furthermore, despite its rather open-ended language, the directive cited by claimant does not establish that the

Department is committed to providing medical facilities at every diplomatic post equal to the best medical facilities in the world. The Department's goal is to provide the best care reasonably possible under the circumstances.

Claimant alleges negligence that occurred in the health clinic of the American Embassy in Monrovia, in two private hospitals in Monrovia, and in State Department offices in Washington, D.C. Thus, under 22 U.S.C. § 6669(f), the tort law applicable to this claim, depending on the particular allegation of negligence, is the law of the District of Columbia and Liberia. This office researched D.C. law; local counsel was retained in Monrovia to advise us on Liberian law.

(a) District of Columbia

Under the law of the District of Columbia, to sustain an action in negligence, the burden is on the plaintiff to show that there was (1) a duty of the defendant to the plaintiff that was breached, *Abbey* v. *Jackson*, 483 A.2d 330 (D.C. 1984), and (2) that the breach caused the injury suffered by the defendant. *Vintch* v. *Furr*, 482 A.2d 811 (D.C. 1984). With regard to breach of duty in an action for medical malpractice, plaintiff must show that defendant did not exercise "that degree of care and skill ordinarily exercised by the profession in his own or similar localities." *Quick* v. *Thurston*, 290 F.2d 360, 362 (D.C. Cir. 1961); *Rodgers* v. *Lawson*, 170 F.2d 157, 158 (D.C. Cir. 1948). With regard to causation, the defendant's negligent conduct is a legal cause of harm to plaintiff if his conduct is a substantial factor in bringing about the harm. *Graham* v. *Roberts*, 441 F.2d 995 (D.C. Cir. 1970) (citing *Restatement (Second) of Torts* § 431 (1965)).

(b) Liberia

The Liberian Private Wrongs Act of 1976 does not contain a specific cause of action for medical malpractice, nor is there any previous case law on the subject matter decided by the Supreme Court of Liberia. The Civil Procedure Law of 1972, however, identifies medical malpractice as one type of personal injury suit. Further, the Constitution of Liberia and several Supreme Court cases state that every person who is injured shall have a remedy for injuries suffered. Consequently it appears that Liberian law does allow a cause of action for medical malpractice, primarily based on common law principles of malfeasance.

The standard of care for medical services in Liberia requires that degree of care and skill which is ordinarily employed by the medical profession in Liberia under similar conditions and like surrounding circumstances. To be free of negligence, a doctor must have exercised the same reasonable and ordinary care, skill, and diligence as a physician in good standing in Liberia would have exercised in the same general line of practice and with the same facilities and equipment in a like case. The particular circumstances considered include the existing state of medical knowledge in Liberia and the established mode of practice, as well as limitations attending to the practice of medicine or the particular branch of medicine.

This standard is breached when the physician deviates from the standard. Although a physician is normally answerable where he is guilty of negligence in the actual treatment of the patient, liability may also be based on fraudulent concealment, such as the withholding of information, practicing without a license, or treating the patient without his consent or

beyond the scope of his consent. Damages are then assessed for injuries that result from the breach which are a natural and probable consequence of the wrongful act or omission. Damages may be for bodily suffering, for mental suffering accompanying bodily injury, for permanent impairment of the ability to earn money, disfigurement and its attendant discomfort, and expenses incurred in treating the wrong.

2. *Administration of antibiotics before obtaining culture.*

Claimant alleges that it was negligent for Dr. Lefton to give the baby Tarpeh-Doe antibiotics before taking samples of the child's body fluids for culturing. Administering the antibiotics masked the infection without eliminating it, alleges claimant, and caused the cultures when finally taken to be falsely negative for salmonella bacteria—the "true" cause of the child's illness.

Under the existing situation and considering the condition of the child, it was not negligent for Dr. Lefton to administer antibiotics to the child before taking culture samples. Under ordinary hospital conditions in the United States blood and spinal fluid samples are generally drawn for culturing before antibiotics are given, but Dr. Lefton was not working under ordinary conditions. Except for the clinic nurse, Dr. Lefton was alone. The child when finally brought in to the Embassy health unit had been ill for almost three days, had large pustular lesions on its buttocks and groin, extending down its legs and up to its umbilicus, and had had at least one seizure earlier that morning. Dr. Lefton properly diagnosed the child as suffering from severe sepsis and probably meningitis, and sent the clinic medical techni-

cian, Mary Awantang, to locate Dr. Van Reken, a local American pediatrician with considerable experience with meningitis. Because in cases of meningitis the time involved in treating the cause of the infection and halting it before it affects the brain is crucial in preventing permanent brain damage, it would have been inappropriate for Dr. Lefton to wait for Dr. Van Reken to arrive before beginning antibiotic treatment. There was no way to contact Dr. Van Reken by telephone, and Dr. Lefton could not be certain how long it would take Ms. Awantang to locate him, if at all. Lefton was also aware that the earliest the child could be placed on an airplane for medical evacuation was in eight hours. In such a situation, a doctor must make a clinical decision on the spot. It was not a breach of that degree of care and skill which is ordinarily employed by a physician in good standing in Liberia under similar conditions to decide to treat the cause of the illness threatening the child's neurological functions before taking culture samples. Furthermore, Dr. Van Reken arrived, and withdrew fluid samples for culture within an hour of Dr. Lefton's administration of antibiotics to the child. It cannot be determined definitely that the one hour was sufficient time for the antibiotics to mask a salmonella infection in all his body fluids.

Finally, as will be elaborated below, salmonella bacteria was not the cause of the child's sepsis and meningitis. The antibiotic treatment administered by Dr. Lefton was effective against both staphylococcus bacteria and the salmonella bacteria later cultured by the Colorado hospital. We know, however, that it did not mask the staphylococcus infection to the point that Dr. Van Reken was prevented from properly diagnosing and treating it. Cultures for salmonella were taken several times over the course of the child's

hospitalization in Liberia, and were negative. On the basis of the negative results of these tests, the diagnosis of the University of Colorado hospital, and our total investigation of the claim, we conclude that the salmonella infection later diagnosed by the Colorado hospital was a superinfection.

3. *Failure of Dr. Lefton to evacuate child immediately, and admission to a substandard hospital.*

Claimant alleges that Dr. Lefton was negligent in failing immediately to medevac the gravely ill child to a hospital in the United States. Claimant fails to establish that Dr. Lefton acted below the standard of care and skill ordinarily employed by physicians in good standing in Liberia under similar conditions and like surrounding circumstances. Because he had little experience in treating meningitis, Dr. Lefton made a qualified decision to evacuate the child unless Dr. Van Reken, a specialist in pediatric meningitis, could be located. Dr. Lefton had a standing arrangement with Pan Am for evacuations to be carried out on little notice. However, Dr. Van Reken did arrive, felt he could treat the child, and Dr. Lefton and Dr. Van Reken together determined that the risk that the gravely ill child would not survive evacution to the United States outweighed the advantages of the medical care available in the U.S. The child had seized once before Dr. Van Reken arrived, and once more after he arrived, as well as at least once that morning before being sought to the clinic. Seizures are evidence that the illness is affecting the brain. The two physicians decided that the best course was to treat the child in Liberia until its condition could be stabilized, and then evacuate it to the United States.

Although evacuation to a closer American hospital in West Germany was also available, the parents of the child insisted that evacuation be made to the United States. The decision on when to evacuate the child is one properly made by the physician on the spot, and was not a breach of the standard of care and skill required of physicians in Liberia.

Claimant alleges that Dr. Lefton was negligent in permitting Dr. Van Reken to admit the child to JFK Hospital over the objections of the family. JFK was known among a number of members of the Embassy Community for its unsanitary conditions. Although Dr. Van Reken acted as a contract physician, he was not an employee of the Department, and the Department is consequently not liable for his actions under the FTCA. I find, however, that Dr. Lefton maintained substantial supervision and control over the care given to the child and retained some responsibility for the child's care. This is especially true with regard to the decision to admit the child to JFK hospital. I find that Dr. Lefton was equally responsible with Dr. Van Reken for that decision.

Based on Liberian law, admitting the child to the JFK Hospital did not constitute negligence. The decision was made for valid medical reasons—the location of Dr. Van Reken at the hospital—and it was one of the two hospitals in the city. Admission of the child did not fall below the standard of care and skill ordinarily employed by physicians in good standing in Liberia since JFK was a facility to which Liberian doctors were regularly referring their patients.

4. *Failure of State Department employees in Washington to ensure that evacuation was carried out by Dr. Lefton*

Claimant alleges that when State Department employees in Washington were notified that medical evacuation was contemplated, and had taken steps to make evacuation available, they should have followed up with Dr. Lefton and ensured that evacuation was actually made on June 4. This allegation has no merit. A determination to evacuate a gravely ill, seizing neonate is one that must be made by the physicians treating the child, not by the Department thousands of miles away. Department officials have no legal duty to make such a decision. The decision to evacuate the child was properly in the hands of the attending physicians, and was properly made when the child's condition had stabilized enough for them to be satisfied that the child could survive the long trip.

5. *Failure of State Department employees in Washington to perform laboratory tests requested, and failure to inform Dr. Lefton promptly of the results of the tests actually performed.*

Claimant alleges that serious errors were made in Washington with respect to the administration of a laboratory diagnostic test, and the reporting of the results obtained to Dr. Lefton in Liberia, and infers without stating that the proper administration of this test would have diagnosed salmonella as the cause of the child's sepsis and meningitis. Our investigation leads us to conclude that there is no merit to this allegation. We understand that the test requested, a counter-immuno electrophoresis (CIE) of the child's

spinal fluid, would not have detected the presence of salmonella bacteria even if it had been carried out. We also understand that the test erroneously carried out in Washington, an immuno electrophoresis, also would not detect the presence of salmonella bacteria allegedly the cause of the child's sepsis and meningitis. Neither test would have affected the diagnosis of the actual infection. Thus, even assuming that mistakes such as those alleged were made, the mistakes did not prevent Dr. Lefton and Dr. Van Reken from diagnosing and treating the cause of the child's sepsis and meningitis. Improper testing when treating a patient does not constitute negligence unless the injuries arose from the wrongful treatment and not from the original condition. *Central Dispensary & Emergency Hospital Inc.* v. *Harbaugh*, 174 F.2d 507 (D.C. Cir. 1949).

6. *Failure correctly to diagnose and treat the salmonella bacteria that allegedly caused baby Tarpeh-Doe's infection and consequent neurological damage.*

Claimant alleges that baby Tarpeh-Doe did not receive adequate care in Liberia from Dr. Lefton and Dr. Van Reken, and that proper diagnosis was not made and proper care was not given until the baby arrived at the University of Colorado Hospital. "By preventing a correct diagnosis of the cause of the baby's meningitis and by failing to make available prompt and proper care," alleges claimant, "the Department of State's health care providers effectively terminated the baby's chances of an injury-free recovery from the illness." There was a "substantial possibility of such a recovery," alleges claimant.

The Department is not liable under the FTCA for actions of Dr. Van Reken, who was only treating the child under contract. Although Dr. Lefton maintained a certain amount of supervision and control over the child's care, particularly with regard to the decision to admit the child to JFK hospital, I will not reach the issue of whether Dr. Lefton retained control over the entire course of the child's treatment. Even assuming that the Department is liable for *all* of Dr. Van Reken's actions—which it is not—claimant has failed to demonstrate any of those actions amounted to negligence.

Claimant does not dispute that Dr. Van Reken diagnosed and properly treated baby Tarpeh-Doe for a staphylococcus infection, and that the staph bacteria was found in cultures of the child's spinal fluid, blood and stools, as well as in cultures of the mother's breast milk. Claimant's allegation is that it was a salmonella bacteria infection and not a staphylococcus bacteria infection that was the real cause of the child's sepsis and meningitis and consequent neurological damage, and that Dr. Lefton and Dr. Van Reken failed to diagnose and treat this salmonella infection. Claimant's only evidence that it was a salmonella infection that caused the sepsis and meningitis is that the child was still ill when admitted to the Colorado University hospital two weeks after treatment began in Liberia, and that the hospital diagnosed a salmonella infection.

Claimant has failed to establish that Dr. Lefton and Dr. Van Reken were unable to diagnose and successfully treat the actual cause of the child's sepsis and meningitis. The first cultures taken by Dr. Van Reken showed staphylococcus bacteria and identified antibiotics effective against the bacteria which were immediately given in adequate dosages. Further-

more, gram stains made of the child's spinal fluid showed gram positive cocci, not salmonella bacteria present. The staphylococcus bacteria found in the cultures and gram stains were the same as those causing the severe mastitis of the mother, and the reasonable inference is that the infections were related. Cultures taken at various times throughout the hospitalization of the child in Liberia would have diagnosed salmonella if it had been present, but did not. The diagnosis of the Colorado University hospital was that the child's severe neurological damage was caused by "gram positive cocci meningitis," and that the salmonella infection was a separate infection. There is nothing in the course of the child's illness in Liberia to indicate otherwise. After the single dose of gentamicin administered by Dr. Lefton before Dr. Van Reken arrived to take over responsibility for the treatment, no antibiotics were administered to treat the staph infection that would have been effective against the salmonella bacteria cultured in the Colorado University hospital. Thus, if a salmonella infection had actually been present and the child given the single dose of gentamicin, as claimant alleges, it would have been found in the spinal fluid, blood, or stool cultures taken at different times during the subsequent course of the child's treatment in Liberia. About mid-point in the child's hospitalization, his condition began to improve markedly, and cultures showed he was free of bacterial infection. It was only the day before the decision to evacuate him to the United States, that the child again became febrile and began seizing. This history is consistent with the diagnosis of a superinfection.

Based on my investigation of this case, I conclude that the salmonella superinfection, the onset of

which was late, which was never cultured or found in the child's spinal fluid, and which was quickly diagnosed and treated, could have caused only minor additional neurological damage to the infant, if at all. The investigation has also led me to conclude that most or all of the severe neurological damage caused by the staphylococcus infection had already occurred when the child was brought in to the Embassy health clinic, and that the treatment received was prompt and effective in eliminating the infection. While it is possible that some neurological damage occurred while treatment to fight the infection was underway, I also note that Dr. Van Reken's treatment was effective as much as possible in reducing the effects of the staphylococcus infection.

7. *Failure to use a chocolate agar culture medium.*

Claimant also alleges that failure to have chocolate agar as a culture medium had an adverse impact on the diagnosis of the organisms causing the child's meningitis. This allegation has no merit. The use of chocolate agar is to detect hemophylus influenza bacteria and the nisseria group of organisms. Neither is alleged to be involved in the child's meningitis.

8. *Improper Hiring, Training, and Supervision of Dr. Lefton*

Claimant alleges that she has "received secondhand information that Dr. Lefton . . . may not have been properly hired, trained or supervised," by the Department. Claimant does not elaborate, however, nor does she allege how this allegedly improper hiring, training or supervision proximately caused the

injuries to claimant's child. Furthermore, the decision not to transfer a doctor to another location is a discretionery function of the government on which an FTCA claim cannot be based. 28 U.S.C. § 2680 (a); *Beins* v. *United States*, 695 F.2d 591 (D.C. Cir. 1982). With regard to improper hiring or training by the government, insufficient evidence on this issue prevents recovery by a plaintiff. *District of Columbia* v. *White*, 442 A.2d 159 (D.C. 1982); *see also Miller* v. *District of Columbia*, 479 A.2d 329 (D.C. 1984).

9. *Failure of the Department to Consult a Neonatologist contacted by the child's grandmother in Colorado.*

Claimant alleges that the Department and Dr. Lefton were negligent in not consulting with a neonatologist, Dr. Gerhart Schrater, contacted by the child's grandmother in Colorado. This allegation is without merit. The child was placed under the care of an experienced doctor in Liberia. Under the circumstances, it would not have been generally accepted practice in Liberia or the United States for a treating physician to consult by telephone or cable with another physician. Furthermore, claimant has not even established that Dr. Schrater would have been willing or able to add anything to the diagnosis and treatment made in Liberia.

B. "Negligence" and Breach of Contract

Claimant alleges that when baby Tarpeh-Doe's mother became pregnant in 1981 in Liberia, that the Department of State or AID had a legal obligation or duty to inform her that she had an option to have her baby in the United States. Claimant alleges that this

option was never explained to Mrs. Tarpeh-Doe and that this failure was both negligent and a breach of contract. Claimant asserts that had Mrs. Tarpeh-Doe been aware of her option she would have elected to have her baby in the United States where he would not have contracted meningitis as a result of exposure to salmonella bacteria.

As a preliminary matter, claimant cannot make a contract claim under the Federal Tort Claims Act. Thus, only claimant's allegation that it was negligent to fail to inform her of her option to have the baby in the United States is presented here. Furthermore, it has already been determined above that salmonella did not cause the meningitis and subsequent neurological injuries to the child, so claimant does not allege negligence that proximately caused any injury. However, even assuming that claimant also alleges that the staphylococcus infection would not have occurred in the United States, and that failure to inform her of a contractual benefit gives rise to a cause of action in negligence under Liberian law, claimant's allegations of negligence fail because Mrs. Tarpeh-Doe was in fact informed that under her contract with the Agency for International Development she had the option of returning to the United States for the birth of her child, or of going to a designated military hospital in West Germany. This information was given during the orientation sessions she attended for new AID employees in Washington before leaving for her post in Liberia. Ms. Awantang, the Embassy medical technician, also informally counseled Mrs. Tarpeh-Doe while she was pregnant to have her baby outside of Liberia. It is not for the Department to speculate why Mrs. Tarpeh-Doe chose to have her baby in Liberia, but the decision was certainly made with the knowledge that other options

were available. Significantly, Mrs. Tarpeh-Doe did not come to the Embassy health clinic for any prenatal care, and never informed Dr. Lefton that she was pregnant. The baby's father was Liberian, and Mrs. Tarpeh-Doe elected to have all her obstetrical care, including delivery, done by a local physician. Even after the child became ill Mrs. Tarpeh-Doe did not have him examined by the Embassy health clinic personnel. It was only by chance that the parents met Nurse Clement on the street as they searched for their local physician, and that therefore she recommended they bring the child to the Embassy clinic. Under all the circumstances, I do not find credible Mrs. Tarpeh-Doe's allegations that she was never informed of her options and was unaware of them.

C. Breach of Warranty

Claimant alleges that Dr. Van Reken made an express warranty to the claimant and her husband that he could cure the baby, and that based on this warranty the family agreed to permit Dr. Van Reken to treat the baby and Dr. Lefton reversed his decision to evacuate the child by airplane to the United States for treatment. Claimant can not bring a breach of warranty claim, which is fundamentally one based on contract, under the Federal Torts Claims Act. Nevertheless, even assuming that the claim could be brought under the Federal Tort Claims Act against the Department, the Department does not find claimant's allegations that Dr. Van Reken gave such a "warranty" to be credible. Dr. Van Reken denies giving such a warranty, and the written medical record supports Dr. Lefton's recollection that he never gave an unqualified promise to medevac the child that was later reversed based on Dr. Van Reken's representa-

tions. Dr. Van Reken was the best qualified and most experienced physician in Liberia for treating neonatal meningitis, and given the critical condition of the child when he was finally brought in to the Embassy clinic, Dr. Van Reken's care was the obvious choice.

III. CONCLUSION

Based on the total investigation of this claim, I am led to conclude that there was one instance of negligence by Department employees in this case: the failure to perform the correct laboratory test in Washington. I also conclude that the negligence did not cause any damages. In an effort to avoid litigation expenses, a settlement of this claim for $50,000 in the form of a structured settlement was offered and rejected by the claimant. There is no basis to increase that offer.

I recommend that this claim now be denied.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20299

Supreme Court, U.S.
FILED
FEB 1 1991
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 90-745

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LINDA WHEELER TARPEH-DOE, individually and as mother and next friend of NYPENPAN TAREH-DOE, and MARILYN L. WHEELER,

Petitioners,

v.

THE UNITED STATES OF AMERICA, and THE SECRETARY OF STATE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS

JOHN JUDE O'DONNELL *
RANDELL HUNT NORTON
JOSEPH MICHAEL HANNON, JR.
THOMPSON, MCGRAIL, O'DONNELL & HARDING
730 15th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-2244
Attorneys for Petitioners
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-745

LINDA WHEELER TARPEH-DOE, individually and as mother and next friend of NYPENPAN TAREH-DOE, and MARILYN L. WHEELER,

Petitioners,

v.

THE UNITED STATES OF AMERICA, and THE SECRETARY OF STATE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS

The Department's brief in opposition endeavors to assure this Court that the Department's administrative decision in this case was both fair and routine. In support of this goal, the Department reproduces *in toto* the heretofore undisclosed Gaither Memorandum in its Appendix.

A full understanding of the Gaither Memorandum, however, leads to the opposite conclusion. Had this litigation involved a federal tort claim with only out-of-country aspects, the Gaither Memorandum would never have been disclosed by the Department. The memorandum was ordered produced by the District Court in the on-going litigation of petitioners' in-country "headquarter's claim" only after a prolonged discovery dispute during which the

Department had asserted that the memorandum was privileged. *See Tarpeh-Doe v. United States*, slip op., No. 88-0270-LFO (D.D.C. Nov. 13, 1990).

Ironically, the Department now asserts that "the claims attorney's memorandum reveals a careful and comprehensive investigation of petitioners' claim." Brief for Resp. at 5 n.2. The irony lies both in the fact that the review was anything but careful and comprehensive and in the fact that the Department had sought protection of the memorandum on the grounds that it was prepared "in anticipation of litigation." That averment prompted the District Court to observe that a review in anticipation of litigation was inconsistent with an objective administrative adjudication. *See* Memorandum at Pet. App. 29a.

The Department's obvious attempt to defuse the constitutional dilemma by assuring this Court that the administrative review was fair encounters a major obstacle which petitioners are obliged to address: the Gaither Memorandum is largely wrong in both its law and facts. At the trial of the in-country component of this litigation—the verdict in which is under advisement by the District Court—the Department did not call as a witness a single physician or expert whose advice supposedly formed the basis of the Gaither Memorandum. While the Gaither Memorandum concludes that the child's injuries resulted from a staphylococcus infection, the Department's position at trial was that the child suffered from a streptococcus infection. The experts who ultimately testified for the Department at the trial of the in-country claim were not even contacted by the Department until years after the Gaither Memorandum was produced. To underscore the unreliability of the Gaither Memorandum, this Court should know that parts of the Gaither Memorandum were accepted in evidence at trial *against the Department*, over objection, as an admission by the Department that it really did not know the true nature of

the child's infection due to Dr. Lefton's masking of the salmonella organism.

The Department also points to the Gaither Memorandum in defending Dr. Lefton's decision not to evacuate the child. The Gaither Memorandum concludes that Dr. Lefton was not negligent in that regard because he chose to place the child in the care of Dr. Van Reken—"the best qualified and most experienced physician in Liberia for treating neonatal meningitis." Brief for Resp. at 6 n.3. According to the sworn testimony at trial, however, Dr. Van Reken was an American missionary physician practicing in Liberia who had never been utilized by the embassy before in a pediatric case. The only reason that Dr. Van Reken was called on the occasion of the child's illness was that the pediatrician ordinarily used by the embassy was unavailable. In actuality, Dr. Lefton entrusted the child to a physician of whose competence he was entirely unaware. It should also be noted that Dr. Van Reken was in charge of the pediatric ward at J.F.K. Hospital, a facility which the Department concedes was maintained in a deplorable condition.

The conclusion in the Gaither Memorandum that Mrs. Tarpeh-Doe was advised to deliver her child outside of Liberia is also contradicted by the sworn testimony of the witnesses at trial. Moreover, such advice was never specifically reduced to writing or included in any of the materials provided to Mrs. Tarpeh-Doe as part of her training. While such information was to be included in the standard health lecture to new employees, Mrs. Tarpeh-Doe denies it was discussed, and the instructor had no independent recollection of including such information in her lecture. Furthermore, the instructor's outline of her lecture did not specifically mention the policy to permit evacuation for childbirth, and Mrs. Tarpeh-Doe's copious class notes do not contain any mention of the policy either.

The testimony before the District Court also confirmed that the premature administration of antibiotics by Dr. Lefton masked the subsequent diagnostic tests performed by him. Dr. Lefton himself testified by deposition that it would have been normal procedure for him to perform a diagnostic spinal tap before administering antibiotics. Dr. Lefton had performed spinal taps on neonates before and could have done so in this case. His administration of antibiotics prior to diagnosis meant that the organism causing the baby's grave illness, salmonella, was not discovered until the baby arrived in Denver, Colorado.

The Gaither Memorandum also exculpates Dr. Lefton on this critical error in judgment, apparently on the grounds that Dr. Lefton was alone when the child was brought to the clinic. However, Nurse Clement was present and Dr. Lefton himself sent medical technician Mary Awantang away to locate Dr. Van Reken. Resp. App. at 13a-14a.

Other conclusions in the Gaither Memorandum relating to the in-country component of petitioners' claim were also contradicted by the testimony in the District Court. Contrary to the Gaither Memorandum's conclusions, the Department of State had actual notice of grave problems regarding Dr. Lefton's performance in Liberia. As part of a periodic inspection performed only a few months prior to the illness of baby Tarpeh-Doe, the State Department Inspection Corps reported the following:

> The medical facility is totally inadequate. Located on the second floor of the Area Communications Office building on converted apartment space, the entire facility comprises about 2,400 square feet. It is crowded, dingy, and anti-therapeutic, among other shortcomings.
>
> * * * *
>
> The significant investment the Department has in the professional staff operating the facility makes it essential that priority be given to providing a fa-

> cility which would meet minimum American health treatment facility standards.
>
> * * * *
>
> The Medical Unit must also improve its image and responsiveness. The inspectors received numerous complaints about it. Health units should make a positive contribution to morale and welfare, and the unit in Monrovia does the opposite.
>
> * * * *
>
> Complaints about the quality of official U.S. health services have been so widespread that it may be the single most significant non-environmental negative factor affecting morale at this post.

The reports of the inspection team were even more pointed regarding the performance of Dr. Lefton. Two months before the treatment of the Tarpeh-Doe baby, Ambassador Crowley, the inspection team leader, advised the deputy medical director at the Department "that there is 'widespread' discontent with Dr. Lefton's performance as RMO [Regional Medical Officer] in Monrovia." Serious consideration was given by the United States Ambassador in Liberia to transferring Dr. Lefton out of the country prior to his regular departure time. In a letter to Ambassador Swing, Dr. Lefton himself acknowledged that there was a widespread belief that "Dr. Lefton has lost interest, lacks sympathy, and is unresponsive to the needs of the community." The inspectors indicated that the complaints about Dr. Lefton were "unprecedented in their experience."

The Office of Medical Services in Washington had also received information that Dr. Lefton had recently gone through a divorce, that his former wife had attempted suicide, and that Dr. Lefton would frequently leave post and travel to Washington, where he would appear at the Office of Medical Services on Monday mornings with a three day growth of beard. None of this conduct spawned

even an inquiry into Dr. Lefton's professional capacities at the time.

The ultimate resolution of these problems was that Dr. Lefton departed the service of the Department of State before his term was completed; however, while these warning signals arose in 1981 and early 1982, Dr. Lefton's departure was not effective until September of 1982, after his mistreatment of baby Tarpeh-Doe.

One of the most startling aspects of the Gaither Memorandum is that in denying Mrs. Tarpeh-Doe's claim the Department of State adopted and applied that standard of medical care applicable to a Liberian rather than an American physician:

> To be free of negligence, a doctor must have exercised the same reasonable and ordinary care, skill, and diligence as a physician in good standing in Liberia would have exercised in the same general line of practice and with the same facilities and equipment in a like case.

Gaither Memorandum, Resp. App. at 12a. While the Department defends this conclusion and lamely opines that "it does not appear that the source of applicable law was of controlling significance" (Brief for Resp. at 5 n.2), this conclusion is a major error and contrary to the explicit representations to employees of the Department that they would be assisted in obtaining the "best possible medical care."

The standard of medical care provided to Department of State employees abroad is set forth in the Uniform State/USIA/AID regulations incorporated in the Foreign Affairs Manual. Pet. at 4. The Gaither Memorandum dispenses with this promise on the theory that "Federal safety and procedure manuals . . . do not create an actionable duty on which tort liability may be based." Resp. App. at 10a. This notion is unsupported by the authorities. It would be more accurate to conclude, as

petitioners' argued in the District Court, that a voluntarily assumed standard of care between employer and employee creates a special relationship under which the employer will be held liable to conform to that standard.

It is apparent that the Department feels constrained to rely on the previously undisclosed Gaither Memorandum because the record herein demonstrates a complete lack of any due process afforded to Mrs. Tarpeh-Doe. However, the evidence presented before the District Court was wholly at odds with the Gaither Memorandum. Petitioners are obliged to bring this information to the attention of the Court because the Department has offered the Gaither Memorandum as a noble example of the standard of due process to which it voluntarily is willing to hold itself. The record in the District Court makes clear that had the Gaither Memorandum been provided to petitioners long ago, its unexamined assumptions and factual and legal inaccuracies could have been brought to the attention of the Department by petitioners and cured.

The Department's reliance on the Gaither Memorandum in this Court is an attempt to avoid review of an important constitutional question through assurances to the Court that the Department considers administrative claims fairly. In reality, the memorandum supports petitioners' arguments that the constitutional issues should be addressed by this Court because it graphically demonstrates the unfairness and error inherent in the Department's Star Chamber proceedings.

CONCLUSION

For the foregoing reasons and those stated in the Petition for Certiorari and in the Brief of Amici Curiae, the Court should grant the petition for *certiorari.*

Respectfully submitted,

JOHN JUDE O'DONNELL *
RANDELL HUNT NORTON
JOSEPH MICHAEL HANNON, JR.
THOMPSON, MCGRAIL, O'DONNELL & HARDING
730 15th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-2244
Attorneys for Petitioners
* Counsel of Record

Supreme Court, U.S.
FILED
JAN 7 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-745

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LINDA WHEELER TARPEH-DOE, individually and as mother and next friend of NYENPAN TARPEH-DOE, and MARILYN L. WHEELER,

Petitioners,

v.

THE UNITED STATES OF AMERICA, and THE SECRETARY OF STATE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF OF THE AMERICAN FOREIGN SERVICE ASSOCIATION AND THE ASSOCIATION OF AMERICAN FOREIGN SERVICE WOMEN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

TURNA R. LEWIS
General Counsel
AMERICAN FOREIGN SERVICE ASSOCIATION
2101 E St., N.W.
Washington, D.C. 20037
(202) 647-8160
Attorney for American Foreign Service Association and the Association of American Foreign Service Women, Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-745

LINDA WHEELER TARPEH-DOE, individually and as mother and next friend of NYENPAN TARPEH-DOE, and MARILYN L. WHEELER,

Petitioners,

v.

THE UNITED STATES OF AMERICA, and THE SECRETARY OF STATE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF OF THE AMERICAN FOREIGN SERVICE ASSOCIATION AND THE ASSOCIATION OF AMERICAN FOREIGN SERVICE WOMEN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

This *amici curiae* brief is filed by the American Foreign Service Association and the Association of American Foreign Service Women in support of petitioners. By letters filed with the Clerk of the Court, petitioners and respondents have consented to the filing of this brief.

INTEREST OF THE AMICI CURIAE

The American Foreign Service Association (AFSA) is a professional and labor organization which represents members of the United States Foreign Service. The American Foreign Service Association has 10,000 members. As a labor organization, the American Foreign Service Association is certified as the exclusive representative of all Foreign Service employees of the Department of State and the Agency for International Development (AID). Employees at other foreign affairs agencies, including the United States Information Agency (USIA) and the Department of Agriculture belong to AFSA, the professional association. The American Foreign Service Association regularly represents the interests of members before the United States Congress, the Executive Branch, the Foreign Service Grievance Board, the Foreign Service Labor Relations Board, and the courts.

The Association of American Foreign Service Women (AAFSW) has a membership of 1,425 and represents women foreign service employees or spouses of foreign service employees who are serving or have served in one of the foreign affairs agencies or at a diplomatic mission overseas. The Association actively promotes the interests of women in all facets of Foreign Service life at home and abroad. AAFSW works for the betterment of the quality of family life in the Foreign Service.

For reasons outlined in the petition and addressed by the District Court decision and the dissent below, these *amici* believe the decision of the U.S. Court of Appeals for the District of Columbia Circuit is erroneous. The American Foreign Service Association and the Association of American Foreign Service Women have a strong interest in obtaining a definitive interpretation that claimants who file claims under the Federal Tort Claims Act and the separate statute of August 1, 1956 are entitled to minimum due process in the claims procedure. Because of the Secretary's responsibility under the statute to resolve

foreign-origin tort claims and the potentially profound, adverse impact on all government employees who serve abroad, the American Foreign Service Association and the Association of American Foreign Service Women urge this Court to grant the petition for certiorari.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT COURT, IF NOT OVERTURNED, WILL HAVE AN ADVERSE IMPACT ON ALL FEDERAL EMPLOYEES WHO WORK ABROAD.

The decision of the United States Court of Appeals for the District of Columbia Circuit holds that the administrative scheme for handling tort claims arising abroad does not require that the State Department comply with minimum due process standards that are commonly provided in analogous applicant benefit programs. Statutory authority for the Department's jurisdiction is provided by the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680, and in a separate statute enacted on August 1, 1956, 22 U.S.C. § 2669(f), which authorizes the Secretary of State to pay foreign-origin tort claims.

According to figures provided by the Office of Personnel Management, as of August 1990, 81,580 federal government employees currently represent the United States overseas. The Circuit Court decision would permit the Department of State to unilaterally decide the standard of medical care that federal government employees are entitled to receive while serving their country abroad, in an *ex parte* and secret proceeding. The mere potential for arbitrary conduct requires the imposition of at least minimal due process.

The petition for a writ of certiorari demonstrates: 1) contravention of Congressional intent; and 2) persuasive and substantial grounds for urging that the decision

here in question is wrong. The American Foreign Service Association and the Association of American Foreign Service Women join petitioner's submissions without repeating them, and further emphasize the serious, adverse, and far-reaching impact of the decision in question on the ability of the Foreign Service to maintain its ranks, and to attract and recruit an adequate, competent work force. Additionally, the decision in question, if left to stand, will adversely affect the ability of federal government employees who work abroad to be fairly compensated, if at all, for the tortious conduct of the government.

The issues raised by this case are of vital importance to all federal government employees who serve their country abroad. It must be noted that the Medical and Health Program of the Department of State, which is at issue here and which sets out the policies and regulations for the provision of medical treatment and health care applies to all federal employees who work abroad, including the Foreign Service. The Foreign Service Act of 1980, as amended, establishes the obligation of the Department of State to provide such care:

> The Secretary of State shall establish a health care program to promote and maintain the physical and mental health of members of the Service, and (when incident to service abroad) other designated eligible Government employees, and members of the families of such members and employees.

22 U.S.C. § 4084.

Through a formal agreement with other federal agencies, the Department of State is the primary provider of medical treatment and health care for many federal agencies such as:

> other U.S. Government agencies participating in AID programs; U.S. Arms Control and Disarmament Agency (ACDA); U.S. Information Agency; Depart-

ment of Agriculture; Department of Commerce; Geological Survey, Department of the Interior; Center for Communicable Diseases, Department of Health, Education, and Welfare [sic]; Drug Enforcement Agency, Department of Justice; the Library of Congress; National Aeronautics and Space Administration; Federal Aviation Administration and Federal Highway Administration, Department of Transportation; Office of International Affairs, Bureau of Customs, Internal Revenue Services, and Veterans Administration, Department of the Treasury.

3 Foreign Affairs Manual § 681.1. (The Foreign Affairs Manual provides the implementing regulations for the Foreign Service Act of 1980, as amended.) Thus the Circuit Court interpretation of the minimum due process accorded employees who file foreign-origin tort claims will not only adversely affect the thousands of employees employed by the Department of State and the Agency for International Development (AID) and their families, but also the tens of thousands of other federal government employees and their families who live and work abroad.

II. THE DISTRICT OF COLUMBIA CIRCUIT COURT'S DECISION CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS WHICH HAVE HELD THAT APPLICANTS FOR IMPORTANT GOVERNMENT BENEFITS ENJOY A PROPERTY RIGHT REQUIRING AT LEAST MINIMUM DUE PROCESS PROTECTIONS.

This decision contravenes Congressional intent that the Federal Tort Claims Act and the Act of August 1, 1956, provide a merit-based, tort compensation scheme and presents grave implications for Foreign Service employees and all federal government employees who serve their country abroad. As the exclusive remedy for foreign-origin tort claims, the Federal Tort Claims Act should include due process for applicants. *See* 22 U.S.C. § 2702. This Act is analogous to other legislatively-enacted programs that provide important benefits to applicants and usually afford some due process protections in the appli-

cation procedure. Lower courts have held that applicants for certain benefits, such as pension benefits and social security disability benefits, have a property right and attendant due process protections. *See McDarby v. Dinkins*, 907 F.2d 1334 (2d Cir. 1990) and *Allison v. Heckler*, 711 F.2d 145 (10th Cir. 1983). Further, in a case involving benefits for miners under the Federal Coal Mine Health and Safety Act, the Circuit Court addressed the issue of due process procedures by presuming the existence of a property interest and held that the procedures afforded the applicant complied with due process. *See Jordan v. Benefits Review Board*, 876 F.2d 1455 (11th Cir. 1989).

Although certiorari was denied by this Court in *Gregory v. Town of Pittsfield*, 470 U.S. 1018 (1985), it is noteworthy that the dissent found reasonable the provision of minimal procedural protections (written notice explaining the decision, informing the applicant of a statutory right to a hearing) to applicants for general assistance. *Id.* at 1021. We believe that Congress intended that applicants who file claims with the Federal Tort Claims Act receive due process in the claims review process. At a minimum, we believe such due process should include: a right to review and rebut the evidence relied upon by the Department to make its decision, written notification of the decision which includes the rationale, and the right of appeal to an independent body, most of which were afforded by the District Court's order below.

If the Circuit Court decision is allowed to stand then Foreign Service employees, as well as all other federal employees who work abroad, have no meaningful remedy for harm suffered as the result of the tortious misconduct of Department of State medical personnel. Consequently, those public servants who are at the greatest risk of experiencing medical negligence because of their employment in a foreign country are afforded no due process in the sole procedure designed to provide them a remedy.

III. THE DISTRICT OF COLUMBIA CIRCUIT COURT'S CONCLUSION THAT THE SECRETARY OF STATE HAS ABSOLUTE DISCRETION TO GRANT OR DENY FOREIGN-ORIGIN TORT CLAIMS RAISES SERIOUS ISSUES ABOUT THE STANDARD OF CARE TO BE PROVIDED TO FOREIGN SERVICE MEMBERS WHO WORK ABROAD AND REQUIRES AUTHORITATIVE GUIDANCE BY THIS COURT.

The Federal Tort Claims Act makes the United States liable for torts of its employees, where its employees would be liable under local law. As the primary health care provider for U.S. employees abroad, the medical policy of the Department of State provides:

> The general medical policy of the Department of State is to assist all American employees and their dependents in obtaining the best possible medical care. This includes personnel of the Department and all agencies participating in the medical program by agreement. This policy extends to the most remote parts of the world, so that no employee need hesitate to accept an assignment to a post where health conditions are hazardous, medical service poor, or transportation facilities limited.

3 Foreign Affairs Manual § 681.2. The stated medical policy of the Department of State read in a reasonable light suggests that employees who work abroad will receive the same standard of care as that provided to federal government employees who are stateside.

Employees accept employment overseas with the expectation that the medical benefits and treatment they receive will be comparable to that which they would receive in the United States, if not better. *See* 3 Foreign Affairs Manual § 681.2. Yet that expectation can be dashed in the secrecy of the administrative claims process, as evidenced by the history of this case.

In the course of the on-going litigation in the District Court of petitioners' "headquarter's claim," *see* Petition

for Certiorari at 3 n.1, the District Court by Memorandum and Order issued November 13, 1990, ordered the Department to disclose to petitioners an internal memorandum [the "Gaither Memorandum"] which constituted the Department's previously secret decision on the administrative claim. Throughout the litigation in the District Court and in the Circuit Court, the Department had jealously guarded the secrecy of this document, as well as others generated in the administrative claims process.

The Gaither Memorandum revealed that in the administrative claims process, the Department ignored the promises of its Medical and Health care program. Instead, in ascertaining whether any standard of care was breached by the Department physicians in Monrovia, the Department took the position that Mrs. Tarpeh-Doe and her infant son were entitled only to that standard of medical care afforded the average Liberian.

In its Memorandum and Order, the District Court observed, regarding this revelation, as follows:

> This conclusion in the Gaither Memorandum is evidence that this was the standard of care maintained by the State Department for its United States citizen employees (and their dependents) stationed in Liberia. Such evidence could be significantly probative of plaintiffs' allegations of supervisory negligence committed in the United States and proximately causing the injury alleged here.

The Department's conclusion—which was kept secret up until the District Court's order of November 13, 1990—makes a mockery of its own medical policy and blatantly contradicts its own regulations. *See* 3 Foreign Affairs Manual § 681.2.

The Department's position as set forth in the Gaither Memorandum, that the standard of care to which the Department will hold itself liable in medical malpractice actions is to be that care reasonably expected by the

average citizen of the host country, represents a drastic change in the promise of the Department to the thousands of citizens employed overseas. As the District Court observed, the Gaither Memorandum constituted an "impermissible secret law." Had the Gaither Memorandum not been disclosed in the course of litigation in the District Court, present and future employees would never be aware of the adverse health consequences of serving their country in foreign outposts. This revelation presents grave implications for the members of *amici curiae*. The District Court's Memorandum and Order will be more particularly described in Petitioners' Reply to the Opposition to Petition for Certiorari.

This revelation in the District Court also fortifies petitioners' argument to this Court that minimal due process rights must attach to the administrative consideration of foreign-origin tort claims. The rights of procedural due process not only protect the individual claimant, but also the public at large. The events of this case starkly emphasize that primary concept of freedom. A secret process is inherently unreliable and leads to the destruction of the rights of all.

The Department regularly assigns employees to worldwide posts. Indeed, such availability for worldwide assignment is a condition of employment. *See* 3 Foreign Affairs Manual § 141.2. Some assignments are in developing countries where there are nonexistent or extremely limited medical facilities. In recognition of this hardship, the Department assigns American physicians and/or nurses to posts where available medical facilities and services are inadequate. *See* 3 Foreign Affairs Manual § 682.2. In addition, the Department provides that "eligible American employees or dependents who are unable to obtain suitable medical care abroad . . . for an overseas-incurred illness, injury, or medical condition may be authorized under certain circumstances by the post to travel to the United States to receive medical care."

3 Foreign Affairs Manual § 685.4-2. That the Department assigns medical staff to posts buttresses the view that Foreign Service employees and their families who are abroad will be provided the same standard of medical care and treatment as provided to stateside employees.

Foreign Service employees risk their lives to serve United States foreign policy interests abroad. As dedicated public servants, they should be entitled to the care promised by their government as a term of employment. And, if medical negligence occurs, the Departmental procedure established to address this issue should include adequate due process protections to ensure a merit-based tort compensation system. Without such a protection, every employee runs the risk that the right to competent medical care will be denied—as it was here—by the Department, perhaps for reasons entirely unrelated to the merits of the individual case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TURNA R. LEWIS
General Counsel
AMERICAN FOREIGN SERVICE ASSOCIATION
2101 E St., N.W.
Washington, D.C. 20037
(202) 647-8160
Attorney for American Foreign Service Association and the Association of American Foreign Service Women, Amici Curiae